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“We are not in Geneva on the Human Rights Council”: Indigenous peoples’ experiences with the World Heritage Convention

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Abstract

This article examines Indigenous peoples’ experiences with the United Nations Educational, Scientific and Cultural Organization’s (UNESCO) World Heritage Convention against the backdrop of their rights as recognized in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and reviews the efforts of Indigenous peoples and human rights mechanisms to ensure respect for Indigenous peoples’ rights, cultures, and values in World Heritage sites. Although the Convention’s governing bodies have adopted policy and operational guidelines “encouraging” states parties to respect Indigenous peoples’ rights, many nomination, management, and protection processes of World Heritage sites continue to be marked by an exclusion of Indigenous peoples from decision making, a lack of respect for their relationship to the land, and disregard for their traditional livelihoods and cultural heritage. Human rights violations against Indigenous peoples continue to occur unabated in many sites and are in many ways enabled, and sometimes even driven, by decision making under the Convention. This article argues that there is an unacceptable disconnect between this Convention and the UN human rights system, with significant implications for the Convention’s and UNESCO’s credibility, and that a concerted effort should be made to align this UN Convention with the UNDRIP and the human rights purposes of the UN Charter and the UNESCO Constitution.

Keywords: World Heritage; Indigenous Peoples; Human Rights; United Nations; UNESCO

Introduction

As the United Nations Educational, Scientific and Cultural Organization (UNESCO) celebrates the fiftieth anniversary of the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), it is worth noting that the history of the Convention closely coincides with the history of Indigenous peoples at the United Nations (UN).¹ The first major UN initiative addressing Indigenous peoples’ rights

¹ Convention Concerning the Protection of the World Heritage and Natural Heritage, 16 November 1972, 1037 UNTS 151 (World Heritage Convention).

was initiated at the same time as the World Heritage Convention was being conceived and drafted.² A process of discussion on racial discrimination within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in the late 1960s and early 1970s, led to the adoption of a resolution by the Economic and Social Council (ECOSOC) on 21 May 1971, authorizing the sub-commission “to make a complete and comprehensive study of the problem of discrimination against indigenous populations and to suggest the necessary national and international measures for eliminating such discrimination.”³ The result was the landmark *Study of the Problem of Discrimination against Indigenous Populations* (commonly known as the *Martínez Cobo Study*), which was published as a series of reports from 1981 to 1983.⁴

The first meeting of Indigenous peoples at the UN – the International Non-Governmental Organization Conference on Discrimination against Indigenous Populations in the Americas – took place only a few weeks after the inaugural session of the World Heritage Committee in Paris in September 1977 at the Palais des Nations in Geneva.⁵ Coincidentally, the opening address at this groundbreaking conference was provided by a representative of UNESCO, who underlined “the importance which UNESCO attaches to the topic under discussion, namely the discrimination against indigenous populations,” noting that the topic was important to UNESCO because of its purpose, according to Article 1 of its Constitution, “to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.”⁶

The *Martínez Cobo Study* and the 1977 Geneva conference were the beginning of a process that would lead to the establishment of several UN bodies and mechanisms dedicated to Indigenous peoples and the promotion of their rights, including the UN Permanent Forum on Indigenous Issues (UNPFII), the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), and the special rapporteur on the rights of Indigenous peoples. The culmination of this process was the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.⁷

Solemnly proclaimed by the UN General Assembly after more than two decades of negotiations between representatives of Indigenous peoples and UN member states, the UNDRIP reflects the existing international consensus regarding the individual and collective human rights of Indigenous peoples in a way that is coherent with the provisions of other human rights instruments.⁸ Acknowledging in its preamble that “indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,” the Declaration responds to “the urgent need to respect and

² On the creation of the World Heritage Convention, see Cameron and Rössler 2013.

³ Economic and Social Council (ECOSOC) 1971.

⁴ ECOSOC 1981–83. The United Nations Educational, Scientific and Cultural Organization (UNESCO) actively contributed to the *Martínez Cobo Study*.

⁵ International Non-Governmental Organization Conference 1977; International Indian Treaty Council (IITC) 1977; “Geneva Report,” *Akwesasne Notes* 9, no. 5, December 1977, <http://cendoc.docip.org/collect/cendocdo/index/assoc/HASH014b/77b7b9ea.dir/Akwesasne%20Notes%20Vol.9%20n5%201977.pdf> (accessed 25 August 2022).

⁶ IITC 1977, 3.

⁷ United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, UNGAOR, 61st Sess., Supp. no. 49, UN Doc. A/61/49, 13 September 2007 (UNDRIP).

⁸ United Nations Human Rights Council (UNHRC) 2011, para. 69; Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) 2011, para. 4.

promote the inherent rights of indigenous peoples, ... especially their rights to their lands, territories and resources.”⁹ The UNDRIP builds upon the general human rights obligations of states under the Charter of the United Nations and is grounded in fundamental human rights norms such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified multilateral human rights treaties, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁰ Several of the Declaration’s key provisions also correspond to existing state obligations under customary international law.¹¹

As emphasized by the former special rapporteur on the rights of Indigenous peoples, S. James Anaya, the UNDRIP does not attempt to bestow Indigenous peoples with a set of special or new human rights but, rather, “provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples.”¹² The standards affirmed in the declaration “share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights.”¹³ The central provisions of the UNDRIP affirm Indigenous peoples’ right to self-determination and to freely pursue their economic, social, and cultural development (Article 3), their right to own, use, develop, and control their lands, territories, and resources (Article 26), their right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions (Article 31), and their right to participate in decision making affecting them, through representatives chosen by themselves in accordance with their own procedures (Article 18). A related provision provides that states shall consult and cooperate in good faith with Indigenous peoples “in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources” (Article 32). The Declaration’s preamble expresses the conviction that “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.”

Articles 41 and 42 of the UNDRIP establish a special obligation of UN agencies and intergovernmental organizations to promote respect for, and act in accordance with, the standards expressed in the Declaration and to establish ways and means of ensuring the participation of Indigenous peoples on issues affecting them. UNESCO’s former director-general Koïchiro Matsuura welcomed the adoption of the UNDRIP as a “milestone for indigenous peoples and all those who are committed to the protection and promotion of cultural diversity,” promising that the UNDRIP would “undoubtedly provide the foremost

⁹ UNDRIP, preambular paras. 6, 7.

¹⁰ UNHRC 2013, paras. 63–65. Since the adoption of the UNDRIP, the human rights treaty bodies that monitor the implementation of these multilateral treaties have frequently interpreted and applied their provisions in ways that reflect the UNDRIP and often explicitly refer to the UNDRIP in doing so. International Covenant on Civil and Political Rights, 6 December 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3; International Convention on the Elimination of All Forms of Discrimination of Racial Discrimination, 7 March 1966, 660 UNTS 195.

¹¹ UNHRC 2013; see also International Law Association (ILA) 2012a, para. 2; 2012b.

¹² UNHRC 2008, para. 86.

¹³ UNHRC 2008, para. 86.

reference point [for UNESCO] in designing and implementing programmes with and for indigenous peoples.”¹⁴ On another occasion, the former director-general remarked:

The 2007 Declaration acknowledges the significant place that indigenous cultures occupy in the world and their vital contribution to our rich cultural diversity, which constitutes, in the words of its preamble ‘the common heritage of humankind’. ... [T]he new Declaration echoes the principles of the UNESCO Universal Declaration on Cultural Diversity (2001)^[15] and related Conventions – notably the 1972 World Heritage Convention, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Each of these recognizes the pivotal role of indigenous peoples as custodians of cultural diversity and biodiversity.¹⁶

However, despite the evident overlap between the two instruments and their broad commonality of purpose, and notwithstanding the special obligation of UN agencies to apply the Declaration in their work, the UNDRIP has received very little attention from the World Heritage Convention’s governing bodies since its adoption in 2007 and, until very recently, has only had a marginal effect on the Convention’s implementation. The reasons for this are largely to be found in the state-centered nature of the Convention, the implementation of which is overseen not by an independent expert body but, rather, by a governmental committee consisting of 21 states parties to the Convention (the World Heritage Committee), elected by the General Assembly of States Parties. In recent years, the decision making of this committee has increasingly been influenced by politics and deal making based on the vested economic and political interests of individual states parties.¹⁷ The inscription of sites on the World Heritage List has become, in particular, a highly politicized affair that is often marked by aggressive lobbying, political maneuvering, and deal making. This decision-making culture “strongly undermines the credibility of the Convention and UNESCO, and the effectiveness of protection strategies,” as Indigenous observers to the Convention have noted.¹⁸

The World Heritage Convention: a double-edged sword for Indigenous peoples

Not surprisingly, considering its date of adoption, the World Heritage Convention was drafted without the participation of Indigenous peoples, and its text does not give any reference or recognition to their rights over cultural and natural heritage. Even though the preamble recognizes that cultural and natural heritage belongs to “peoples” rather than states, the Convention grants states ultimate control over determining which heritage sites within their national borders may fall under the Convention’s regime and entrusts them with all responsibilities concerning the nomination, management, and protection of World Heritage sites.¹⁹ “Little to no mention is made of community involvement in protecting heritage, and ... in determining what their heritage actually is,” as Lucas Lixinski has noted,

¹⁴ UNESCO 2007.

¹⁵ The Universal Declaration on Cultural Diversity states in Art. 4 that “[t]he defence of cultural diversity ... implies a commitment to human rights and fundamental freedoms, in particular the rights of ... indigenous peoples.” Universal Declaration on Cultural Diversity, 2 November 2001, 41 ILM 57.

¹⁶ UNESCO 2008.

¹⁷ Bertacchini et al. 2016; Brumann 2021; World Heritage Watch 2021; Disko 2022.

¹⁸ International Indigenous Peoples’ Forum on World Heritage (IIPFWH) 2021a.

¹⁹ ILA 2012b, 17.

and peoples and local communities “are assumed to be fairly represented by States” in the Convention’s processes.²⁰

As a result, respect for the rights, heritage, worldviews, and values of Indigenous peoples in the World Heritage Convention’s processes until today depends to a significant extent on the recognition of Indigenous peoples’ rights under the domestic laws of the states parties and the good will of governmental agencies responsible for the Convention’s implementation at the national level. While there are several World Heritage sites that are managed by Indigenous peoples themselves or jointly managed by Indigenous peoples and government agencies in a spirit of partnership, mutual respect, and trust, the history of the Convention has largely been one of exploitation, exclusion, and neglect of Indigenous peoples, and many World Heritage sites are managed in ways that are harmful to Indigenous peoples and the protection of their heritage and highly inconsistent with the standards affirmed in the UNDRIP.

As will be further discussed below, a main reason for the World Heritage Convention’s adverse impacts on many Indigenous peoples is the definition of “heritage” contained in the Convention and its interpretation and application by the committee and its advisory bodies.²¹ Given the lack of participation of Indigenous peoples in the drafting of the Convention, it is no surprise that the conception of culture and heritage in the Convention fails to reflect Indigenous peoples’ worldviews and perspectives. The notion of “cultural heritage” in the Convention is essentially based on a “European-inspired monumentalist vision of cultural heritage which isolate[s] its physical dimensions from its non-physical ones,”²² whereas, for Indigenous peoples, tangible and intangible elements of heritage are deeply interconnected and interrelated manifestations of their ancient and continuing relationship with their lands, territories, and resources.²³ Furthermore, the Convention establishes a rigid, artificial distinction between cultural and natural heritage, which is incompatible with Indigenous peoples’ holistic view of their heritage. The unique cultural context of Indigenous peoples is therefore not given the respect and recognition required to safeguard their cultures and cultural heritage, undermining the World Heritage Convention’s ambition and claim to be a global instrument for the protection of universally recognized values.

The World Heritage Convention’s human rights deficit

Unlike some of the other cultural conventions adopted under the auspices of UNESCO, such as the 2003 Convention for the Safeguarding of Intangible Cultural Heritage,²⁴ the World Heritage Convention does not contain any references to human rights or international human rights instruments, nor can any such references be found in the *travaux préparatoires* of the Convention.²⁵ The Convention also does not mention the people and communities

²⁰ Lixinski 2014, 196. In contrast, the Convention for the Safeguarding of Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 1 (CSICH), recognizes “that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage” (preamble para. 6) and underlines the need for states parties to ensure their participation in the identification, definition, and safeguarding of intangible cultural heritage and to involve them actively in its management (Arts. 11(b), 15).

²¹ The World Heritage Committee (WHC) has three official advisory bodies: the International Union for Conservation of Nature (IUCN), the International Council on Monuments and Sites (ICOMOS), and the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM).

²² Yusuf 2008, 29.

²³ United Nations Commission on Human Rights (UNCHR) 1993; EMRIP 2015.

²⁴ CSICH.

²⁵ Vrdoljak, Liuzza, and Meskell 2021, 3.

living in or around World Heritage sites, aside from a provision according to which states parties “shall endeavor ... to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community” (Article 5(a)). This disregard for human rights during the elaboration of the Convention – which is surprising considering UNESCO’s purpose according to its Constitution²⁶ – has had a profound and lasting impact. It has shaped the discourses and practice of the World Heritage Committee, its advisory bodies, and its Secretariat (the UNESCO World Heritage Centre) for decades and continues to be reflected in the implementation of the Convention at all levels.

During the first three decades following the World Heritage Committee’s inaugural session in 1977, human rights did not play any role in the discussions and considerations of the World Heritage Committee. No references to human rights were included in the Operational Guidelines for the Implementation of the World Heritage Convention,²⁷ and none of the committee’s decisions mentioned human rights. The advisory bodies and the World Heritage Centre only referred to human rights in isolated cases in their advice provided to the committee,²⁸ partly because they feared that it “could trigger a negative reaction and complete rejection of the issues by some Committee members.”²⁹

With few exceptions, little attention was paid during this period to the concerns, needs, and priorities of Indigenous peoples affected by World Heritage sites and their participation in World Heritage processes and the management and governance of sites. References to Indigenous peoples were completely absent from the Operational Guidelines. Local communities were for the first time mentioned in the guidelines in 1994, when a sentence was included stating that “[p]articipation of local people in the nomination process [of World Heritage sites] is essential to make them feel a shared responsibility with the State Party in the maintenance of the site,” and another sentence was added saying that nominations of sites falling into the category of “cultural landscapes” should be prepared “in collaboration with and the full approval of local communities.”³⁰ A number of additional references to local communities were added to the Operational Guidelines in 2005 – most notably, a provision “encouraging” states parties to “ensure the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, non-governmental organizations (NGOs) and other interested parties and partners in the identification, nomination and protection of World Heritage properties.”³¹ However, none of these provisions mentioned rights, and none of them created procedural obligations, meaning that their implementation was left entirely to the discretion of the states parties.

In July 2007, the World Heritage Committee, at the initiative of New Zealand, adopted a new Strategic Objective: “To enhance the role of communities in the implementation of the

²⁶ Vrdoljak, Liuzza, and Meskill 2021, 3.

²⁷ The Operational Guidelines are periodically revised by the WHC to reflect new concepts, knowledge, or experiences. For the historical development of the guidelines and historical versions, see <https://whc.unesco.org/en/guidelines/>.

²⁸ Most notably in the context of the debate on the proposed Jabiluka uranium mine on Aboriginal land within Kakadu National Park. See WHC 1998; Vrdoljak 2018, 257.

²⁹ IUCN 2011a: “Let us now turn to a reflection on how best approach human rights in the context of the World Heritage Convention. While generally I would like to see a firm indigenous rights discourse integrated in Committee deliberations, I am afraid it could trigger a negative reaction and complete rejection of the issues by some Committee members... A good strategy to deal with concrete sites, as in State of Conservation reports or nominations, seems to be to work from within the Convention, as applicable, with the instruments, rules and language the Convention provides... Such a discrete approach seems to achieve encouraging results in current Committee decisions, and, more importantly, lead to on-the-ground conservation benefits for indigenous peoples.”

³⁰ WHC 1994, paras. 14, 41.

³¹ WHC 2005, para. 12. Similarly, para. 64 (in relation to the preparation of Tentative Lists) and para. 123 (preparation of nominations).

World Heritage Convention,” in recognition of the “critical importance of involving indigenous, traditional and local communities in the implementation of the Convention.”³² Together with the UNDRIP, which was adopted a few weeks later, this fifth Strategic Objective provided an important impetus for increased attention on human rights issues in the context of the World Heritage Convention, although it would take many years for the World Heritage Committee to include references to human rights and Indigenous peoples into the Operational Guidelines and commit, at least on paper, to a human rights-based approach to World Heritage conservation.

The nature-culture divide in the World Heritage Convention

The World Heritage Convention is remarkable in that it establishes a common regime for the protection of cultural and natural heritage and is widely celebrated for its “unprecedented recognition of the close link between culture and nature.”³³ In fact, the World Heritage Centre considers this the most significant feature of the Convention: “The most significant feature of the 1972 World Heritage Convention is that it links together in a single document the concepts of nature conservation and the preservation of cultural properties. The Convention recognizes the way in which people interact with nature, and the fundamental need to preserve the balance between the two.”³⁴ These ideas are also reflected in the official emblem of the Convention, adopted by the World Heritage Committee in 1978, which symbolizes the interdependence of cultural and natural heritage and is supposed to convey “the essential objectives of the Convention.”³⁵

However, the experiences of many Indigenous peoples with World Heritage sites established in their territories stand in sharp contrast to these ideas and objectives and call into question the ways in which the World Heritage Convention is being implemented. Despite its recognition and celebration of the interdependence of cultural and natural heritage, the World Heritage Committee maintains a differentiation between “cultural” and “natural” World Heritage sites that is highly problematic where Indigenous peoples’ territories and heritage are concerned. An overwhelming majority of World Heritage sites in Indigenous peoples’ territories are designated as “natural sites,” without any recognition of associated Indigenous heritage values in the justification for inscription (statement of outstanding universal value [OUV]) and in disregard of Indigenous peoples’ holistic view of their heritage.³⁶ The former chairperson of the UNPFII, Myrna Cunningham, has noted:

One of the specific challenges for indigenous peoples is the World Heritage Convention’s differentiation between “cultural” heritage on the one hand and “natural” heritage on the other. This distinction can be problematic for World Heritage sites located on indigenous peoples’ lands and territories because their lives and spiritual beliefs are inseparable from their lands, territories and natural resources. Hence, indigenous peoples’ natural and cultural values are deeply interconnected by their holistic view of land. Decision-making and management of sites must therefore also be holistic, with no artificial separation of culture, nature and human rights.³⁷

³² See WHC 2007, 192–93 (Decisions 31 COM 13A and 13B).

³³ Francioni 2008, 7.

³⁴ UNESCO, “The World Heritage Convention,” <http://whc.unesco.org/en/convention> (accessed 16 August 2022).

³⁵ WHC 1978, paras. 51–53.

³⁶ As noted by EMRIP, “[f]or indigenous peoples, cultural and natural values are inseparably interwoven and should be managed and protected in a holistic manner.” EMRIP 2015, 20.

³⁷ Cunningham 2012, 52.

The underlying reason for the World Heritage Committee's differentiation between cultural and natural World Heritage sites lies in the fact that the Convention establishes a rigid distinction and artificial division between cultural heritage and natural heritage by defining them separately, in Articles 1 and 2 respectively.³⁸ In accordance with Article 11.2 of the Convention, the World Heritage List is comprised of "properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established." One of the first tasks completed by the World Heritage Committee, at its first session in 1977, was the adoption of two separate sets of criteria for the determination of OUV: six criteria related to cultural heritage (i–vi) and four related to natural heritage (i–iv).³⁹ Depending on the criteria under which a site is inscribed on the World Heritage List, it is classified as a cultural or natural World Heritage site.

Although there is a possibility for sites to be listed as "mixed" cultural and natural heritage sites, this can only happen if they satisfy both cultural and natural criteria of OUV in the assessment of the World Heritage Committee and if they are nominated as mixed sites by the states parties in whose territory they are situated to begin with.⁴⁰ However, there are significant practical and financial implications that may discourage states from nominating sites as mixed sites. In particular, states often prefer to nominate nature-protected areas as natural rather than mixed sites because mixed nominations are considered too complex.⁴¹ Nominating a site as a mixed site essentially involves preparing two nominations (one for cultural criteria and one for natural criteria), which are evaluated separately by the committee's advisory bodies (International Council on Monuments and Sites [ICOMOS] and the International Union for the Conservation of Nature [IUCN] respectively) and which can be accepted or rejected by the committee independently from each other. The number of mixed sites on the World Heritage List is therefore exceedingly small – as of 2022, only 39 out of 1,154 World Heritage sites were listed as mixed sites.⁴²

There have been various attempts by the World Heritage Committee to bridge the divide between nature and culture and facilitate the recognition of nature-culture interlinkages in the OUV of World Heritage sites. Most significantly, in 1977, when the committee adopted the initial criteria for the determination of OUV, it included references to "man's [*sic*] interaction with his natural environment" and to "exceptional combinations of natural and cultural elements" in the inscription criteria for natural World Heritage sites.⁴³ Then, in 1992, the committee made some modifications to the cultural criteria to accommodate the listing of "cultural landscapes."⁴⁴ It also adopted guidelines distinguishing between three categories of cultural landscapes: designed, organically evolved, and associative cultural landscapes.

³⁸ It should be noted that the separation between culture and nature in the World Heritage Convention's definition of heritage is not absolute. Most significantly, the definition of cultural heritage in Art. 1 includes a reference to "combined works of nature and man."

³⁹ WHC 1977a.

⁴⁰ WHC 2015a, para. 46. When nominations of mixed sites are evaluated, the cultural and natural values are assessed separately, "almost as if one would be looking at two different nominations." Leitão and Badman 2015, 82.

⁴¹ Buckley and Badman 2014, 116; Larsen and Wijesuriya 2015, 10; Disko 2017, 58.

⁴² While a state party's decision not to nominate a site for its Indigenous values may of course be based on a realistic assessment that such an effort may not be successful under existing criteria, there can be no doubt that many natural World Heritage sites hold Indigenous values that would have fulfilled the cultural criteria at the time of inscription. In some cases, this was also explicitly stated by the WHC. On the other hand, there are also cases of sites that were nominated for their Indigenous values but only inscribed for their natural values due to negative assessments of ICOMOS referring to a lack of exceptionality, integrity, or authenticity of Indigenous values. See Disko 2017, 58ff.

⁴³ See WHC 1977b, 4.

⁴⁴ Cameron and Rössler 2013, 67–68; Leitão and Badman 2015, 78.

Inscription of the latter on the World Heritage List is “justifiable by virtue of the powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence, which may be insignificant or even absent.”⁴⁵ The inclusion of the category of associative cultural landscapes was a key step toward the recognition of intangible values in the context of the Convention. It has facilitated a better recognition of the cultural and spiritual values that Indigenous peoples attach to their lands and territories in several World Heritage sites, such as Tongariro National Park in New Zealand, Uluru-Kata Tjuta National Park in Australia, or, more recently, Pimachiowin Aki in Canada.

The introduction of the cultural landscapes concept had some serious drawbacks, however. Ironically, it has actually deepened the nature-culture divide in the implementation of the World Heritage Convention as the committee simultaneously deleted the references to “man’s interaction with his natural environment” and “exceptional combinations of natural and cultural elements” from the natural criteria, based on the consideration that these phrases were inconsistent with the legal definition of natural heritage in Article 2 of the Convention.⁴⁶ These deletions have made it impossible to appropriately acknowledge Indigenous peoples’ relationship with the land in the OUV of natural World Heritage sites. Robert Layton and Sarah Titchen remarked in 1995:

We deplore the deletion of references to human agency from the natural heritage criteria. The deletions appear to revive the outmoded concept of wilderness areas purified of human action.... We fear that in promoting the idea of wholly natural landscapes, UNESCO may inadvertently deny the continuing traditional use of the natural resources contained within World Heritage properties by indigenous peoples and unwittingly collude in the displacement of indigenous peoples from areas included in the World Heritage List.⁴⁷

Problematic application of the concept of “outstanding universal value”

The principal purpose of the World Heritage Convention is the identification and long-term protection of cultural and natural heritage sites of OUV. A main problem for Indigenous peoples is the fact that the Convention has come to be interpreted and applied in ways that often make it difficult or impossible for Indigenous peoples’ cultural heritage and values to be recognized as part of a site’s OUV. Under the current regulations, Indigenous peoples’ cultural values, including interconnections between nature and culture, only become part of the justification for inscription when they are assessed to be of OUV in their own right, which is not a realistic possibility in the context of many sites. While it is possible for Indigenous peoples’ relationship with their lands and territories, including spiritual associations, to be recognized as having OUV, the committee requires such relationships or associations to be “unique” or “exceptional,” a standard that is difficult to meet in many cases.⁴⁸ The committee also maintains a standard of “authenticity” for cultural heritage

⁴⁵ WHC 1994, para. 39.

⁴⁶ Whitby-Last 2008, 57; Cameron and Rössler 2013, 68.

⁴⁷ Layton and Titchen 1995, 179–80.

⁴⁸ Some Indigenous peoples have strongly objected to this requirement. For instance, in the nomination of Pimachiowin Aki, it was made clear that the First Nations of the area, out of respect for other Indigenous peoples, “do not wish to see their property as being ‘exceptional’ as they did not want to make judgements about the relationships of other First Nations with their lands and thus make comparisons.” ICOMOS 2013, 39. Pimachiowin Aki representatives noted that they objected to a process that “requires indigenous people to make inappropriate claims of superiority about our cultures in comparison to other nations and communities in order to grant us special recognition.” Quoted in R. Feneley, “Indigenous Leaders Told of ‘Insulting’ UN Rule on World Heritage

sites, which is applied in ways that preclude World Heritage recognition of Indigenous peoples' cultural heritage in many places.⁴⁹ When they are not seen as “exceptional” or “unique” by conservation agencies, ICOMOS, and/or the committee, or not “intact” or “authentic” enough, Indigenous cultural values are disregarded when the OUV of World Heritage sites is established. A 2011 joint submission of Indigenous organizations to the UNPFII stated: “We are concerned that the concepts of ‘outstanding universal value,’ ‘integrity’ and ‘authenticity’ are interpreted and applied in ways that are disrespectful of Indigenous peoples and their cultures, inconsiderate of their circumstances and needs, preclude cultural adaptations and changes, and serve to undermine their human rights.”⁵⁰

This lack of respect for Indigenous peoples' own values attached to their lands and territories not only raises serious questions regarding the validity of the meanings attributed to the respective sites by the World Heritage Committee but can also have significant adverse effects on Indigenous peoples' livelihoods and living cultural heritage as the justification for inscription may heavily affect conservation strategies and management priorities. According to the Operational Guidelines, the statement of OUV adopted at the time of inscription provides “the basis for the future protection and management of the property,” and states must ensure that human use within World Heritage sites “fully respects the OUV of the property.”⁵¹ If Indigenous peoples' perspectives, cultural values, and relationship to the land are not recognized and reflected when the OUV of a site is defined, this can significantly limit their future role in site management and decision making and can also affect their land use and their rights to their lands, territories, and resources.⁵²

Indigenous peoples' experiences with World Heritage sites

Of the 1,154 properties inscribed on the World Heritage List as of 2022, a substantial number are fully or partially located within the lands and territories of Indigenous peoples.⁵³ These “Indigenous sites” on the World Heritage List are situated in many different countries and widely distributed throughout the world. It is evident that the experiences of Indigenous peoples with World Heritage sites and the processes of the World Heritage Convention vary strongly from country to country and from site to site, depending on the local circumstances. A major factor affecting the role of Indigenous peoples in site management and decision making is the degree of recognition of Indigenous peoples and their rights at the national level, which is extremely uneven between regions and also within particular regions. In some countries, the degree of recognition of Indigenous peoples' rights has also changed considerably from the time the first World Heritage sites were established to the present day, with significant effects on the role of Indigenous peoples in World Heritage sites.⁵⁴

Listing,” *Sydney Morning Herald*, 28 May 2013, <https://www.smh.com.au/national/indigenous-leaders-told-of-insulting-un-rule-on-world-heritage-listing-20130527-2n7ac.html> (accessed 30 August 2022).

⁴⁹ For examples, see International Work Group for Indigenous Affairs (IWGIA) and Forest Peoples Programme 2015, para. 12.

⁵⁰ Endorois Welfare Council et al. 2011.

⁵¹ WHC 2015a, paras. 119, 155.

⁵² Disko and Ooft 2018.

⁵³ Although establishing an exact number of these “Indigenous sites” would be difficult and require careful analysis, it is clear that there are well over 100 of them. The vast majority are listed as natural sites. Additionally, a significant number of Indigenous sites are included on states parties' tentative lists of potential World Heritage sites. See “World Heritage List,” <http://whc.unesco.org/en/list> (accessed 30 August 2022); “Tentative Lists,” <http://whc.unesco.org/en/tentativelists> (accessed 30 August 2022).

⁵⁴ For instance, in Australia, the adoption and application of the Aboriginal Land Rights (Northern Territory) Act 1976 and the Native Title Act 1993 have strongly affected the management of some World Heritage sites. See, for example, Adams 2014; Marrie and Marrie 2014.

Positive experiences

Some Indigenous peoples have no doubt benefited from the establishment of World Heritage sites in their territories, particularly in countries where Indigenous peoples' collective rights to their lands, territories, and resources are recognized and protected at the national level. Since World Heritage status provides an additional level of protection beyond domestic laws and regulations, World Heritage sites can obviously play a positive role for Indigenous peoples by helping them protect their lands and territories, as well as their cultural heritage and traditional ways of life, from development pressures such as extractive industry activities or threats posed by major infrastructure projects. World Heritage sites can also create business and employment opportunities for Indigenous peoples – for instance, in the tourism sector or directly in the management of sites and related conservation activities. If designed and managed with the inclusion and full and effective participation of Indigenous peoples and with respect for their collective rights, World Heritage sites can thus serve to support and protect Indigenous peoples' livelihoods and self-determined development.

A number of World Heritage sites in Indigenous peoples' territories have been nominated at the initiative of the Indigenous peoples themselves, with a view to protecting ancestral lands or creating new livelihood opportunities.⁵⁵ Others have been nominated at the initiative of conservation organizations or government agencies but with the effective participation and free, prior, and informed consent (FPIC) of the Indigenous peoples concerned.⁵⁶ Most of the sites that were nominated with the meaningful involvement and approval of Indigenous peoples were proposed and subsequently listed as mixed sites or cultural sites (often as cultural landscapes), in recognition of the cultural or spiritual values attached to the sites by the Indigenous peoples, meaning that their OUV is fully or partly based on Indigenous values. This not only ensures a continued consideration of Indigenous cultural values in conservation strategies, but normally also implies that Indigenous peoples must be effectively involved in site management and decision-making, so that it is ensured that the Indigenous values are safeguarded for future generations. In some cases, the recognition of Indigenous cultural values as part of the OUV of World Heritage sites has greatly assisted Indigenous peoples in their efforts to gain a greater role in the management and governance of sites.⁵⁷

There are several World Heritage sites today that are managed by Indigenous peoples themselves or through collaborative management frameworks that provide for consensus decision making between conservation authorities and Indigenous peoples. Examples include the Laponian Area in Sweden, Kakadu National Park in Australia, Sᑭang Gwaay in Canada, and Taos Pueblo in the United States.⁵⁸ East Rennell in the Solomon Islands is entirely under customary land ownership and management.⁵⁹ The protection of those sites is generally based on respect for Indigenous peoples' special relationship with their lands, territories, and resources and an integration of traditional knowledge and land management practices into conservation strategies. In most of these sites, the OUV is at least partly based on Indigenous cultural values, and often much or all of the land within the sites is legally recognized as being owned by Indigenous peoples. These sites demonstrate that the World

⁵⁵ Examples include Taos Pueblo in the United States, listed in 1992; Pimachiowin Aki in Canada, listed in 2018; Aasivissuit – Nipisat in Greenland, listed in 2018; and Budj Bim in Australia, listed in 2019.

⁵⁶ Examples include Tongariro National Park in Aotearoa New Zealand, listed in 1990; Laponian Area in Sweden, listed in 1996; and East Rennell in Solomon Islands, listed in 1998.

⁵⁷ See, in particular, the case of the Laponian Area. Heinämäki, Hermann, and Green 2015.

⁵⁸ For references, see IWGIA, IIPFWH, and Indigenous Peoples of Africa Co-ordinating Committee (IPACC) 2022.

⁵⁹ Notably, East Rennell is only listed for natural values. Its inscription in 1998 established an important standard and precedent in relation to the acceptance of customary law and management as a sufficient basis for the management and long-term protection of natural World Heritage sites. Larsen, Oviedo, and Badman 2014, 67.

Heritage Convention can be implemented in ways that support Indigenous peoples' rights, livelihoods, and aspirations and help fulfill the desire of the General Assembly of States Parties that the Convention be "a global leader and standard-setter for best practice."⁶⁰

Negative experiences

For most Indigenous peoples, however, experiences with World Heritage sites have been not so positive. On the contrary, particularly in Africa and Asia, where recognition of Indigenous peoples' rights is weak, the establishment of World Heritage sites has often led to a loss of control of Indigenous peoples over their lands, territories, and resources, human rights violations, and loss of cultural heritage, among many other adverse impacts. It is a well-known fact that, for many Indigenous peoples worldwide, the creation of protected areas has resulted in dispossession and alienation from their traditional lands and resources, forced evictions, restrictions on their traditional use of resources, loss of livelihoods, loss of access to sacred sites, and other injustices and human rights violations committed against them.⁶¹ This legacy, from which many Indigenous peoples continue to suffer, is also shared by many of the protected areas inscribed on the World Heritage List. Violations of Indigenous peoples' rights in the management of World Heritage sites are therefore often a continued legacy of the protected areas in question, many of which were declared as national parks or nature reserves a long time before they were nominated as World Heritage sites. However, the designation as World Heritage sites has in many cases aggravated or consolidated Indigenous peoples' loss of control over their lands, led to additional restrictions on their traditional land and resource use, and further undermined their livelihoods. Many human rights violations against Indigenous peoples have also occurred as a direct result of the implementation of the World Heritage Convention and in the context of World Heritage processes, as illustrated later in this article.

At the occasion of the World Heritage Convention's fortieth anniversary in 2012, an international expert workshop on the World Heritage Convention and Indigenous peoples therefore issued an urgent "call to action":

Concerned about the legacy of past and ongoing injustices, and chronic, persistent human rights violations that have been and continue to be experienced by Indigenous peoples as a result of the establishment and management of protected areas, including many areas inscribed on the World Heritage List;

Recognizing the historical and persistent human rights violations and breaches of fundamental freedoms being perpetrated by States and others against Indigenous individuals and peoples as a direct result of the implementation of the World Heritage Convention and actions of the World Heritage Committee.⁶²

Throughout the history of the Convention, Indigenous peoples have frequently raised concerns about violations of their rights in its implementation, not only at the national level in the nomination and management of specific World Heritage sites but also at the international level in the practice of the World Heritage Committee, its Secretariat, and its advisory bodies. Frequently raised human rights concerns include, *inter alia*, disrespect for

⁶⁰ WHC 2015c, para. 5.

⁶¹ Stevens 1997, 2014; African Commission on Human and Peoples' Rights (ACHPR) 2003; Colchester 2003; Brockington and Igoe 2006; Dowie 2009; Springer and Almeida 2015; UN 2016, 2022.

⁶² Copenhagen Expert Workshop 2012 (emphasis in original).

Indigenous peoples' right to participation and FPIC in the identification, nomination, and inscription of sites; the disregard of Indigenous peoples' cultural heritage, values, and perspectives in defining the OUV of sites; the marginalization of Indigenous peoples in the management and governance of sites; involuntary evictions of Indigenous peoples from their ancestral lands; violations of Indigenous peoples' customary rights to access and use their traditional lands, territories, and resources and to carry out traditional subsistence activities; violations of their rights to access religious and cultural sites; the harassment and criminalization of Indigenous individuals engaging in traditional activities; the lack of equitable access of Indigenous peoples to conservation benefits; the lack of consultation with Indigenous peoples by monitoring and site evaluation missions; and a lack of possibilities for Indigenous peoples to participate effectively in the decision-making processes of the World Heritage Committee.

A recurrent, key problem is the nomination and inscription of World Heritage sites without the FPIC of the Indigenous peoples in whose territories they are located. Most Indigenous sites inscribed on the World Heritage List were nominated without the consent or meaningful participation of the Indigenous peoples concerned – in many cases, without any consultation with the Indigenous peoples at all.⁶³ There are also some sites that were inscribed despite strong objections from Indigenous peoples.⁶⁴ As a result of this exclusion, most of the nomination dossiers for World Heritage sites in Indigenous peoples' territories show little to no regard for Indigenous peoples' land and resource rights, livelihoods, cultural heritage, and values, with significant implications for conservation strategies and site management. Most of the Indigenous World Heritage sites are inscribed as natural sites, without any recognition of Indigenous cultural values in the justification for inscription. In many cases, the statements of OUV do not even mention the existence of the Indigenous peoples. What is more, in some OUV statements, Indigenous peoples and their traditional livelihood activities are identified as current or potential threats to the OUV.⁶⁵ The OUV of those sites therefore not only fails to reflect the heritage values attributed to the sites by Indigenous peoples but also conflicts with them in significant ways and may thus be harmful to their protection.

This lack of recognition and respect for the values attributed to World Heritage sites by Indigenous peoples reduces their relevance in conservation strategies and reinforces the marginalization of Indigenous peoples in the management and governance of the sites. In most of the Indigenous sites on the World Heritage List, Indigenous participation in site management is either absent or very limited, and Indigenous peoples are routinely excluded from decision making that has major impacts on their lives.⁶⁶ Generally, this marginalization is a continued legacy of the protected areas in question, which were often declared decades before they were included on the World Heritage List and often have a long history of injustices and human rights violations committed against Indigenous peoples.

In many World Heritage areas, Indigenous peoples are primarily considered as threats, or potential threats, to conservation objectives. Often tight restrictions and prohibitions are imposed on Indigenous land use practices such as hunting, gathering, farming, or

⁶³ Cunningham 2012. For examples, see the case studies in Disko and Tugendhat 2014.

⁶⁴ Examples include Kakadu National Park in Australia, the Wet Tropics of Queensland in Australia, the Western Ghats in India, and the Kaeng Krachan Forest Complex in Thailand. See O'Brien 2014, 316; Marrie and Marrie 2014, 348–49; Bijoy 2014, 234–40; A. Lawattanatrakul, "Kaeng Krachan Forest Named World Heritage Site amidst Indigenous Rights Concerns," *Prachatai English*, 28 July 2021, <https://prachatai.com/english/node/9363> (accessed 30 August 2022).

⁶⁵ See, e.g., the Outstanding Universal Value Statement for the Ngorongoro Conservation Area. WHC 2010a, 190–93.

⁶⁶ E.g., see Disko and Tugendhat 2014.

pastoralism in violation of Indigenous peoples' cultural and subsistence rights.⁶⁷ In some World Heritage areas, Indigenous communities experience high levels of violence, intimidation, and human rights abuses by rangers or army personnel enforcing the restrictions.⁶⁸ Many of the restrictions and prohibitions on Indigenous peoples' land and resource use in World Heritage sites are closely related to the World Heritage status of the sites and the recommendations and requests of the World Heritage Committee and its advisory bodies. In some cases, they have had severe consequences for Indigenous peoples' food security, health, and well-being. For example, in the Ngorongoro Conservation Area (NCA) in Tanzania, a ban on subsistence cultivation has resulted in a serious situation of hunger and food insecurity that affects most of the area's 80,000 Maasai residents. The cultivation ban can be directly linked to the interventions of UNESCO, the IUCN, and ICOMOS and forms part of a strategy to encourage the "voluntary relocation" of Indigenous communities to areas outside of the NCA.⁶⁹

The World Heritage List contains several protected areas from which Indigenous peoples have been forcibly removed.⁷⁰ While these relocations often happened a long time before the sites were nominated to the World Heritage List, there are also some cases where Indigenous peoples were removed from protected areas with the intention of facilitating inscription as a "natural" World Heritage site.⁷¹ There are also instances where Indigenous peoples have been pressured to leave or forcibly removed after the inscription on the World Heritage List.⁷² While the Operational Guidelines have recognized since 2005 that "no area is totally pristine" and that "[h]uman activities, including those of traditional societies and local communities, often occur in natural areas ... [and] may be consistent with the Outstanding Universal Value of the area where they are ecologically sustainable," there continues to be a "misconception that World Heritage nomination requires community presence and rights to be extinguished for site recognition [as a natural site]."⁷³ Moreover, there are several examples in the history of the World Heritage Convention, including its recent history and ongoing implementation, where the World Heritage Committee, the advisory bodies, and the World Heritage Centre have actively encouraged the "voluntary relocation" of Indigenous peoples from specific World Heritage areas. For instance, in the case of Salonga National Park in the Democratic Republic of Congo, state of conservation reports from UNESCO and the IUCN as well as the decisions of the committee have repeatedly identified "Indigenous hunting, gathering and collecting" as a threat to the park and encouraged the "voluntary relocation" of

⁶⁷ EMRIP 2015, para. 55.

⁶⁸ See, e.g., Pillay, Knox, and MacKinnon 2020; IWGIA, IIPFWH, and IPACC 2022, paras. 22–23; Lawyers' Association for Human Rights of Nepalese Indigenous Peoples 2020; Flummerfelt 2022; Luoma 2022; Rogers 2022; K. Baker and T. Warren, "WWF's Secret War," *Buzzfeed News*, 2019–20, <https://www.buzzfeednews.com/collection/wwfsecretwar> (accessed 25 August 2022).

⁶⁹ See PINGOs Forum 2012; Olenasha 2014, 204–5; Ndaskoi 2021; Maasai Indigenous Residents 2022.

⁷⁰ Some examples are Bwindi Impenetrable National Park in Uganda, Kahuzi-Biega National Park in Democratic Republic of Congo (DRC), Thungyai – Huai Kha Khaeng Wildlife Sanctuaries in Thailand, Kaeng Krachan National Park in Thailand, Lake Bogoria National Reserve in Kenya, Serengeti National Park in Tanzania, Chitwan National Park in Nepal, Nouabalé-Ndoki National Park in Congo, Yellowstone National Park in the United States, and Yosemite National Park in the United States. See Dowie 2009; Disko and Tugendhat 2014; Vrdoljak, Liuzza, and Meskell 2021.

⁷¹ Titchen 2002. Examples are Bwindi Impenetrable National Park in Uganda and Kaeng Krachan Forest Complex in Thailand. See Tumushabe and Musiime 2006; Dowie 2009, 67; Office of the High Commissioner for Human Rights (OHCHR) 2021b.

⁷² Cunningham 2012, 54. Recent examples are South China Karst in China; Wulingyuan Scenic Area in China; Salonga National Park in the DRC; and Ngorongoro Conservation Area in Tanzania. See Disko 2020, 732–33; OHCHR 2022b, 2.

⁷³ Larsen, Oviedo, and Badman 2014, 78; WHC 2015a, para. 90.

Indigenous communities from the park.⁷⁴ In the case of the Ngorongoro Conservation Area, UNESCO, the World Heritage Committee, and the advisory bodies have for many years identified the livelihood activities and growing population of the NCA's pastoralist residents as major threats to the OUV of the site and repeatedly encouraged Tanzania to promote the "voluntary relocation" of the Indigenous communities to areas outside of the NCA.⁷⁵

In addition to concerns about the violation of their rights at individual World Heritage sites, by national and subnational institutions and authorities, Indigenous peoples have frequently raised concerns about their exclusion from international decision-making processes related to World Heritage sites – that is, the decision making of the World Heritage Committee.⁷⁶ Although some Indigenous peoples have managed to engage with the committee and its advisory bodies effectively,⁷⁷ no mechanisms exist through which Indigenous peoples can reliably bring concerns regarding the nomination and management of World Heritage sites to the attention of the committee. First, there is no effective way for Indigenous peoples' representatives to participate in the sessions of the committee. Although it is possible in principle for Indigenous representatives to participate as observers, voices from Indigenous peoples and civil society have no formal place in the committee meetings and may only be heard at the discretion of the chairperson.⁷⁸ Speaking time for observers is limited to one or two minutes, and their interventions usually have negligible effect on the committee's debate;⁷⁹ in some sessions (depending on the chairperson), observers are only allowed to present statements after the committee has already adopted its decisions on particular agenda items.⁸⁰

Second, there have been numerous complaints by Indigenous peoples about a failure of the advisory bodies and the World Heritage Centre to consult with Indigenous peoples in evaluating World Heritage nominations and monitoring the state of conservation of World Heritage sites. Accordingly, their evaluations and reports provided to the World Heritage Committee have in many cases failed to address human rights grievances of Indigenous peoples.⁸¹ The evaluation of nominations is carried out by the IUCN (natural heritage) and ICOMOS (cultural heritage) and entails both field missions and desk reviews; the state of conservation of World Heritage sites is monitored by the World Heritage Centre and the advisory bodies (the IUCN, ICOMOS, and the International Centre for the Study of the Preservation and Restoration of Cultural Property [ICCROM]) and can also involve field missions. Representatives of the World Heritage Centre and the advisory bodies have pointed to the limitations of their financial resources as a main constraint for carrying out consultations with all affected Indigenous peoples in the evaluation and monitoring of sites as well as to time constraints during field missions and political challenges such as a lack of cooperation by governments.⁸² However, it is also clear that the procedures of the advisory bodies are inadequate for consistently ensuring that Indigenous peoples are effectively consulted by on-site evaluation and

⁷⁴ For details, see IWGIA, IIPFWH, and IPACC 2022, para. 13.

⁷⁵ For details, see Olenasha 2014; Disko 2020, 733.

⁷⁶ See IWGIA and Forest Peoples Programme 2015.

⁷⁷ See, in particular, the case of the Mirarr people from Kakadu National Park. Cameron and Rössler 2013; O'Brien 2014.

⁷⁸ Cameron and Rössler 2013, 216–19; Vrdoljak 2018, 269.

⁷⁹ Brumann 2015, 279; 2021, 105.

⁸⁰ Most recently at the forty-fourth session of the WHC in 2021. See WHC 2022, 150, 363ff.

⁸¹ A notable example is the failure of the IUCN to mention the 2009 Endorois ruling of the African Commission on Human and Peoples' Rights in the 2011 evaluation of the Kenya Lake System in the Great Rift Valley. Larsen 2012; Larsen, Oviedo, and Badman 2014; Sing'Oei 2014.

⁸² Larsen 2012; UN 2012, para. 39; IWGIA 2013, 26–27, 57.

monitoring missions.⁸³ Moreover, as organizations focused on the conservation of nature and tangible heritage, the advisory bodies do not always have the expert capacity to appropriately address issues related to Indigenous peoples and their heritage, and there are also questions about their neutrality when it comes to balancing their institutional priorities with the rights and interests of Indigenous peoples.⁸⁴

The proposal for a World Heritage Indigenous Peoples Council of Experts

In 2000, during the twenty-fourth session of the World Heritage Committee in Cairns, Australia, Indigenous peoples for the first time made a concerted effort to enhance their role in the implementation of the World Heritage Convention and the decision making of the committee, out of concern over the “lack of involvement of Indigenous peoples in the development and implementation of laws, policies and plans ... which apply to their ancestral lands within or comprising sites now designated as World Heritage areas.”⁸⁵ Noting the obligations of states parties to recognize, respect, promote, and protect the rights and interests of Indigenous peoples in World Heritage areas, consistent with their obligations under international law, the forum of Indigenous peoples assembled in Cairns petitioned the committee and the states parties to the Convention to establish a World Heritage Indigenous Peoples Council of Experts (WHIPCOE) as a consultative body to the committee. WHIPCOE was envisioned to “complement existing expert groups under the convention being IUCN, ICOMOS and ICCROM” by providing “expert Indigenous advice on the holistic knowledge, traditions and cultural values of Indigenous Peoples relative to the implementation of the World Heritage Convention.”⁸⁶ It was supposed to provide advice on both “the appropriate identification, evaluation and management of ‘mixed’ properties and ‘cultural’ properties with indigenous associations and the identification, management and possible renomination of properties listed for their ‘natural’ World Heritage values that may also hold indigenous values.”⁸⁷

At the same time, the Indigenous peoples forum in Cairns appealed to the World Heritage Committee and the states parties to recognize “the holistic nature of Indigenous natural and cultural values and traditions”; that those values and traditions were “dynamic living values rather than static historic ones”; and that the maintenance and survival of those values and traditions was “dependent upon [Indigenous peoples’] continued access to and use of traditional biological resources” and “necessary to ensure the complete conservation of the biological diversity by which many areas qualified for World Heritage Listing.”⁸⁸ States parties were also called on to enable “effective and meaningful consultation, co-operation and involvement of Indigenous peoples ... in the management of their ancestral territories that fall within World Heritage areas now” and

⁸³ IWGIA, IIPFWH, and IPACC 2022, para. 20.

⁸⁴ IWGIA 2013, 57.

⁸⁵ WHC 2001a, Annex V.

⁸⁶ WHC 2001a, Annex V. Among other things, the World Heritage Indigenous Peoples Council of Experts (WHIPCOE) was to contribute to the evaluation of World Heritage nominations, participate in reactive monitoring and periodic reporting, and contribute to the system of international assistance. Additionally, it was envisioned that WHIPCOE would, at the request of states parties and Indigenous peoples, advise in the preparation of nominations and renominations of sites that hold Indigenous values, advise in the management of such sites and assist in building the capacity to manage World Heritage properties in accordance with Indigenous values. The members of WHIPCOE were supposed to be Indigenous persons from World Heritage sites in Indigenous peoples’ territories or working for the management agencies of such sites. WHC 2001a, 2001c.

⁸⁷ WHC 2001b, 5.

⁸⁸ WHC 2001a, Annex V.

to ensure that “traditional knowledge [is] given the same respect as any other form of knowledge” in the management of World Heritage areas.⁸⁹

The proposal to establish WHIPCOE was discussed by the World Heritage Committee at its twenty-fifth session in 2001 in Helsinki. However, although the advisory bodies and several states parties strongly supported the proposal, the committee “did not approve the establishment of WHIPCOE as a consultative body of the Committee or as a network to report to the Committee.”⁹⁰ The former chairperson of the IUCN’s World Commission on Protected Areas, Adrian Phillips, attributed this decision to a “dismissive attitude towards indigenous peoples’ issues” among some of the committee members.⁹¹ The committee raised a number of concerns relating to the funding, legal status, role, and relationships (with the states parties, advisory bodies, World Heritage Committee, and World Heritage Centre), and “[s]ome members of the Committee questioned the definition of indigenous peoples and the relevance of such a distinction in different regions of the world.”⁹² The head of Thailand’s delegation to the committee expressed the view that “indigenous issues are a domestic, national question, and are best handled on that level. It is then up to each State Party to bring site nominations to the Committee. Through the mechanism proposed, you would be introducing a political element.”⁹³

Intervention of human rights mechanisms

After the World Heritage Committee’s rejection of the proposal to establish WHIPCOE, Indigenous peoples brought their concerns regarding the implementation of the World Heritage Convention to the attention of the UN human rights system. These efforts were aided by the UN’s appointment of a special rapporteur on the situation of human rights and fundamental freedoms of Indigenous people in 2001, the inauguration of the UNPFII in 2002, the establishment of EMRIP in 2007, and, especially, the adoption of the UNDRIP in 2007. These advances strongly amplified the voice of Indigenous peoples within the UN, firmly placed their issues on the international agenda, and greatly increased the pressure on UN agencies and intergovernmental organizations to take action to protect the rights and interests of Indigenous peoples in their respective fields of influence.

UNPFII

In May 2002, Mirarr senior traditional owner Yvonne Margarula, from the Kakadu National Park World Heritage area in Australia, submitted a statement to the inaugural session of the UNPFII, recommending that the UNPFII undertake an independent study on Indigenous peoples and World Heritage. The statement suggested that the study should be based on case studies from Indigenous peoples living in World Heritage areas and analyze the effectiveness of the World Heritage Convention in protecting Indigenous peoples’ sacred sites and living traditions, the impact of the World Heritage Committee’s Operational Guidelines on Indigenous peoples in World Heritage areas, and the participation of Indigenous peoples in the committee’s decision-making processes.⁹⁴ Although this recommendation was not immediately taken up by the UNPFII, the forum never lost sight of

⁸⁹ WHC 2001a, Annex V.

⁹⁰ WHC 2002, 57. Also see WHC 2001d, 9–10; Logan 2013; Meskell 2013.

⁹¹ Quoted in IUCN 2002, 15.

⁹² WHC 2002, 57.

⁹³ Quoted in UNESCO 2001, 2.

⁹⁴ Mirarr People 2002.

the issue as Indigenous peoples in subsequent years repeatedly raised concerns with the forum about violations of their rights in World Heritage sites and the implementation of the Convention.⁹⁵

In 2010, the UNPFII, which has a mandate to provide advice on Indigenous issues to the UN system and to promote respect for the UNDRIP,⁹⁶ for the first time, sent a representative to a session of the World Heritage Committee, Victoria Tauli-Corpuz, an Igorot from the Philippines. The purpose of this participation was to inform the committee about the numerous concerns related to World Heritage sites that Indigenous peoples had brought to the UNPFII's attention.⁹⁷ However, Tauli-Corpuz was only given one minute to speak and therefore was not able to enumerate the concerns in her statement before the committee.⁹⁸ Instead, the UNPFII submitted its concerns and recommendations in writing. The written submission noted that the UNPFII had received complaints about "a list of indigenous sites inscribed in the World Heritage List without the adequate participation and involvement of indigenous peoples" since its first session in 2002, and it included, *inter alia*, the following recommendations:

- that the initial efforts to establish a World Heritage Indigenous Peoples' Council of Experts (WHIPCOE) be revisited, and efforts to set up an appropriate mechanism whereby Indigenous experts can provide advice to the committee and the World Heritage Center be revived;
- that adequate consultation and participation of Indigenous peoples be ensured and their FPIC be obtained when their territories are being nominated as World Heritage sites;
- that the involuntary displacement or relocation of Indigenous peoples from World Heritage sites be stopped;
- that the subsistence economic activities of Indigenous peoples in World Heritage sites not be undermined or illegalized and adequate social services be provided to Indigenous peoples living in these sites;
- that the UNDRIP and the UNDG Guidelines on Indigenous Peoples' Issues be used as frameworks when World Heritage sites in Indigenous territories are nominated and managed as well as for missions done in these areas; and
- that the inclusion of Indigenous experts be considered when missions are held to review the World Heritage sites located in Indigenous peoples' territories.⁹⁹

A year later, at the UNPFII's tenth session in May 2011, a joint statement was presented by a broad coalition of Indigenous organizations from around the world expressing serious concern about the "continuous and ongoing disrespect of the principle of FPIC" by the World Heritage Committee when inscribing sites in Indigenous peoples' territories on the World Heritage List.¹⁰⁰ The statement alleged that three nominations under

⁹⁵ United Nations Permanent Forum on Indigenous Issues (UNPFII) 2010a. A compilation of relevant statements to the UNPFII is contained in the endnotes of Endorois Welfare Council et al. 2011.

⁹⁶ See ECOSOC 2000, para. 2; UNDRIP, Art. 42.

⁹⁷ UNPFII 2010a, 2010b.

⁹⁸ UNPFII 2010b; see also WHC 2010b. Informing colleagues about her experience, Victoria Tauli-Corpuz wrote: "Can you imagine? Indigenous peoples always complain that we only give them 3 minutes and 5 minutes [at the UNPFII] and in here we can only talk for one minute. ... [W]e have to work with a State party who is willing to take up our issues. Then we have to talk with the IUCN, ICOMOS and ICCROM to also take up our concerns. They are the only bodies outside of the State Parties who can speak. UNESCO, I think, is one of the most archaic or dinosauric UN agencies." Personal communication with Victoria Tauli-Corpuz, 28 July 2010.

⁹⁹ UNPFII 2010a.

¹⁰⁰ Endorois Welfare Council et al. 2011.

consideration by the committee at the time (Western Ghats, Sangha Trinational, and Kenya Lake System in the Great Rift Valley, all nominated as “natural sites”) had been prepared without meaningful involvement of affected Indigenous peoples and without giving due consideration to their cultural values and stewardship roles. It urged the UNPFII to call on the committee not to approve these nominations until the Indigenous peoples concerned had been adequately involved and had provided their FPIC.¹⁰¹ In response, the UNPFII adopted a recommendation encouraging the committee to review existing procedures and operational guidelines with a view to ensuring Indigenous peoples’ FPIC and the protection of their livelihoods and tangible and intangible heritage in the context of World Heritage nominations. It also expressed its availability to assist in the review and revision of the Operational Guidelines. Additionally, the UNPFII called on the committee and the advisory bodies to “scrutinize current World Heritage nominations to ensure they comply with international norms and standards of free, prior and informed consent.”¹⁰²

A representative of the UNPFII, Kanyinke Sena, attended the World Heritage Committee’s subsequent session in June 2011 and was able to present the recommendations made at the tenth session of the forum in an oral statement to the committee.¹⁰³ A non-governmental organization (NGO) representative also read a summary version of the joint statement of Indigenous organizations, drawing attention to the concerns about the nominations of the Western Ghats, the Sangha Trinational, and the Kenya Lake System.¹⁰⁴ However, the committee completely ignored these concerns and did not even discuss the (lack of) involvement of Indigenous peoples in the preparation of the nominations. The Kenya Lake System was immediately inscribed on the World Heritage List; the nominations of Western Ghats and the Sangha Trinational were referred back to the submitting states parties (for unrelated reasons) but soon resubmitted and approved a year later without the concerns of Indigenous peoples having been resolved.¹⁰⁵

In September 2012, several current and former members of the UNPFII participated in an international expert workshop on the World Heritage Convention and Indigenous peoples that was organized by the Danish Agency for Culture, the Greenland government, and the International Work Group for Indigenous Affairs in Copenhagen as part of the Convention’s fortieth anniversary. The workshop resulted in a “call to action” containing recommendations on how to align the implementation of the Convention with the UNDRIP as well as a set of proposed amendments to the Operational Guidelines aimed at ensuring respect for Indigenous peoples’ right to FPIC in the context of World Heritage listing.¹⁰⁶ At its twelfth session in 2013, the UNPFII welcomed the recommendations of the expert workshop and encouraged the committee to consider “revisions to the guidelines relating to the human rights of indigenous peoples, including the principle of FPIC,” underlining the need for UNESCO and the committee to “implement the Convention in accordance with the rights enshrined in the UNDRIP, taking an approach based on human rights.”¹⁰⁷

¹⁰¹ Endorois Welfare Council et al. 2011.

¹⁰² UNPFII 2011a, paras. 38–42.

¹⁰³ UNPFII 2011b.

¹⁰⁴ See WHC 2011a, 150.

¹⁰⁵ See IWGIA et al. 2012; WHC 2012, 130, 191–96; Brumann 2021, 34–34, 105, 126. On the nomination processes for Western Ghats and Sangha Trinational, see Amougou-Amougou and Woodburne 2014; Bijoy 2014.

¹⁰⁶ UNESCO 2012; IWGIA 2013. The outcome documents of the expert workshop are available at <http://whc.unesco.org/en/events/906/> (accessed 12 August 2022).

¹⁰⁷ UNPFII 2013, para. 23.

African Commission on Human and Peoples' Rights

The 2011 World Heritage designation of the Kenya Lake System without the consent of the Endorois drew sharp international criticism and prompted strong responses from human rights bodies. The Kenya Lake System includes the Lake Bogoria National Reserve, which was the subject of a landmark 2009 ruling of the African Commission on Human and Peoples' Rights (ACHPR), the so-called *Endorois* decision.¹⁰⁸ In this ruling, the ACHPR condemned the forcible eviction of the Indigenous Endorois people from their ancestral lands surrounding Lake Bogoria during the creation of the national reserve in the 1970s. The ACHPR found that the evictions and the failure to subsequently involve the Endorois in the management and benefit sharing of the reserve had violated their human rights to property, natural resources, development, culture, and religion. It ordered Kenya, among other things, to “[r]ecognise rights of ownership to the Endorois and Restitute Endorois ancestral land” and to “[p]ay adequate compensation to the community for all the loss suffered.”¹⁰⁹ The ruling also underlined that, in the case of any development projects that would have a major impact within Endorois territory, “the State has a duty not only to consult with the community, but also to obtain their FPIC, according to their customs and traditions.”¹¹⁰

The World Heritage listing of Lake Bogoria happened less than two years after the *Endorois* decision, although the Endorois community had sent several communications to UNESCO informing them both about the ruling and the fact that they had not been consulted or included in the nomination process.¹¹¹ This provoked the ACHPR to adopt a specific resolution in which it expressed deep concern about the listing, emphasizing that the inscription of Lake Bogoria “without involving the Endorois in the decision-making process and without obtaining their FPIC contravenes the African Commission’s Endorois Decision and constitutes a violation of the Endorois’ right to development under Article 22 of the African Charter [on Human and Peoples’ Rights].”¹¹² The resolution also noted with concern that “numerous World Heritage sites in Africa [had] been inscribed without the FPIC of the indigenous peoples in whose territories they are located and whose management frameworks are not consistent with the principles of the UNDRIP.”¹¹³ Referencing Article 1 of UNESCO’s Constitution and the UNDRIP, the ACHPR urged the World Heritage Committee and UNESCO “to review and revise current procedures and Operational Guidelines ... in order to ensure that the implementation of the World Heritage Convention is consistent with the UNDRIP and that indigenous peoples’ rights, and human rights generally, are respected, protected and fulfilled in World Heritage areas.”¹¹⁴ It further called on the committee to “consider establishing an appropriate mechanism through which indigenous peoples can provide advice to the World Heritage Committee and effectively participate in its decision-making processes.”¹¹⁵

¹⁰⁸ Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council v. Kenya, Decision on Communication 276/2003, 25 November 2009 (*Endorois* decision).

¹⁰⁹ *Endorois* decision.

¹¹⁰ *Endorois* decision.

¹¹¹ IWGIA et al. 2012; Sing’Oei 2014, 177–79.

¹¹² ACHPR Resolution 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 Site, Res. 197(L)2011, 2011, para. 1 (ACHPR Resolution).

¹¹³ ACHPR Resolution, preamble.

¹¹⁴ ACHPR Resolution, para. 2.

¹¹⁵ ACHPR Resolution, para. 3.

Additionally, the ACHPR criticized the IUCN for having recommended the inscription of Lake Bogoria in its advice provided to the World Heritage Committee,¹¹⁶ despite Kenya's failure to involve the Endorois in the nomination process. It therefore urged the IUCN to "review and revise its procedures for evaluating World Heritage nominations as well as the state of conservation of World Heritage sites, with a view to ensuring that indigenous peoples are fully involved in these processes, and that their rights are respected, protected and fulfilled in these processes and in the management of World Heritage areas."¹¹⁷

EMRIP

The World Heritage listing of Lake Bogoria National Reserve without the FPIC of the Endorois also immediately drew the attention of EMRIP, which was at the time in the middle of preparing advice to the UN system and states on Indigenous peoples and the right to participate in decision making.¹¹⁸ Informed about the listing by the Endorois Welfare Council and some of its partner organizations,¹¹⁹ EMRIP addressed UNESCO directly in this 2011 advice, calling on it to "enable and ensure effective representation and participation of indigenous peoples" in decision making related to the World Heritage Convention.¹²⁰ It underlined that "[r]obust 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 FPIC is obtained when their territories are being nominated and inscribed as World Heritage sites."¹²¹ A year later, following the listing of the Western Ghats and the Sangha Trinational without the FPIC of the affected Indigenous peoples,¹²² EMRIP added to this by encouraging the World Heritage Committee to "establish a process to elaborate, with the full and effective participation of indigenous peoples, changes to the current procedures and operational guidelines and other appropriate measures to ensure that the implementation of the World Heritage Convention is consistent with the UNDRIP and that indigenous peoples can effectively participate in the World Heritage Convention's decision-making processes."¹²³

A study on the rights of Indigenous peoples with respect to their cultural heritage, which was undertaken in 2015, provided an opportunity for EMRIP to delve deeper into the subject of World Heritage, including the issue of the nature-culture divide and the concept of OUV. On a general note, the study underlines that "[h]eritage policies, programmes and activities affecting indigenous peoples should be based on full recognition of the inseparability of natural and cultural heritage, and the deep-seated interconnectedness of intangible cultural heritage and tangible cultural and natural heritage" and that "[f]or indigenous peoples,

¹¹⁶ IUCN 2011b, 77–84.

¹¹⁷ ACHPR Resolution, para. 4. In response to this, the World Conservation Congress (the IUCN's highest decision-making body) in 2012 adopted a resolution noting that it shared the concerns of the ACHPR and requesting the IUCN to develop policies and guidelines to ensure that the UNDRIP is respected in its work as an advisory body and that Indigenous peoples are fully informed and consulted when sites are evaluated or missions undertaken on their territories. It also supported the ACHPR's calls for a revision of the Operational Guidelines and the establishment of a mechanism for Indigenous participation in the committee's decision-making. IUCN 2012.

¹¹⁸ EMRIP 2011.

¹¹⁹ IWGIA et al. 2011. The Endorois Welfare Council is the organization of the Endorois community that brought the Endorois case before the ACHPR.

¹²⁰ EMRIP 2011, para. 38; see also para. 6.

¹²¹ EMRIP 2011.

¹²² See EMRIP 2012, paras. 53, 56; IWGIA 2012. In 2015, EMRIP highlighted the "blatant lack of respect for the FPIC of the concerned communities, as the affected indigenous peoples had not even seen the submitted nomination documents, which had not been made publicly available." EMRIP 2015, 13–14.

¹²³ EMRIP 2012, 7 ("Proposal 9: World Heritage Committee"). Similarly, see EMRIP 2015, 11–12, 22–23.

cultural and natural values are inseparably interwoven and should be managed and protected in a holistic manner.”¹²⁴ In regard to the World Heritage Convention specifically, the study notes:

To be included on the World Heritage List, sites must be of “outstanding universal value”, a concept which can lead to management frameworks that prioritize the protection of those heritage aspects at the expense of the land rights of indigenous peoples. As a result, the protection of world heritage can undermine indigenous peoples’ relationship with their traditional lands, territories and resources, as well as their livelihoods and cultural heritage, especially in sites where the natural values are deemed to be of outstanding universal value but the cultural values of indigenous peoples are not taken into account.¹²⁵

EMRIP therefore issued the following advice to the committee: “The World Heritage Committee should adopt changes to the criteria and regulations for the assessment of ‘outstanding universal value’ so as to ensure that the values assigned to World Heritage sites by indigenous peoples are fully and consistently recognized as part of their outstanding universal value.”¹²⁶

Special rapporteur on the rights of Indigenous peoples

Like EMRIP and the UNPFII, the special rapporteur on the rights of Indigenous peoples has repeatedly been approached by Indigenous peoples expressing “concerns over their lack of participation in the nomination, declaration and management of World Heritage sites, as well as concerns about the negative impact these sites have had on their substantive rights, especially their rights to lands and resources.”¹²⁷ The special rapporteur has therefore criticized the procedures and policies of the World Heritage Committee as inadequate for safeguarding the rights of Indigenous peoples and, much like EMRIP and the UNPFII, has repeatedly called on the committee to review and revise its Operational Guidelines with a view to ensuring that the implementation of the Convention is consistent with the UNDRIP.¹²⁸

A letter sent in 2013 by then Special Rapporteur S. James Anaya to the director of the World Heritage Centre emphasized the need for the World Heritage Committee to improve existing nomination procedures so as to “ensure that indigenous peoples’ rights and worldviews are fully valued and respected in all current and future World Heritage site designations as well as in the overall implementation of the World Heritage Convention.”¹²⁹ In addition to reiterating the need to ensure the meaningful participation and FPIC of Indigenous peoples in the nomination of sites, he encouraged a discussion on potential reforms to the criteria for World Heritage status, as well as the advisory bodies’ evaluation processes, in order to enable a concurrent consideration of natural and cultural values and

¹²⁴ EMRIP 2015, 20.

¹²⁵ EMRIP 2015, 14–15.

¹²⁶ EMRIP 2015, 23. A similar recommendation for change was made in the “Promise of Sydney” adopted by the 2014 IUCN World Parks Congress: “The World Heritage Convention should fully and consistently recognise Indigenous Peoples’ cultural values as universal, and develop methods for recognition and support for the interconnectedness of natural, cultural, social, and spiritual significance of World Heritage sites, including natural and cultural sites and cultural landscapes.” Quoted in UNESCO 2015, 6.

¹²⁷ UN 2012, para. 33.

¹²⁸ See, e.g., UN 2012, 33–42; 2016, 60–64, 85; 2022; OHCHR 2013.

¹²⁹ OHCHR 2013.

thus facilitate Indigenous-centered nominations.¹³⁰ Additionally, he underlined the importance of transparency in nomination and implementation processes, safeguarding Indigenous peoples' land and resource rights during the nomination process, ensuring that Indigenous peoples derive benefits from World Heritage sites that impact them,¹³¹ and providing redress for past injustices and violations of Indigenous peoples' rights in World Heritage sites.¹³²

Additionally, the special rapporteur has sent several communications to the World Heritage Committee,¹³³ the advisory bodies,¹³⁴ and individual states¹³⁵ in order to denounce violations of Indigenous peoples' rights in specific World Heritage sites and urge them to take corrective action. In 2021, Special Rapporteur Francisco Calí Tzay from Guatemala, a former member of the Committee on the Elimination of Racial Discrimination (CERD), became the first special rapporteur to participate in a session of the World Heritage Committee. The aim of his participation in the forty-fourth session of the committee was to express his mandate's serious concerns over Thailand's nomination of the Kaeng Krachan Forest Complex (KKFC), which was – once again – considered for inscription on the World Heritage List by the committee at that meeting. However, as described in more detail below, he was not given the opportunity to speak until after the decision to inscribe the property had already been made.

Office of the UN High Commissioner for Human Rights

First submitted by Thailand in 2013, the nomination of the KKFC had for years drawn the attention of human rights bodies, including CERD, which considered the situation of the Karen Indigenous communities in the KKFC under its urgent action and early warning procedure.¹³⁶ The nomination process of the KKFC was accompanied by persistent human rights abuses against the Karen communities, including violent forced evictions of community members from their ancestral land, the burning of Karen houses and rice barns, attacks and harassment by conservation authorities, unlawful arrests and prosecutions, and even murder and enforced disappearance of human rights defenders working for the Karen.¹³⁷ These human rights violations were in many ways linked to Thailand's efforts to gain World Heritage status for the KKFC under natural criteria, due to assumptions that the presence and traditional resource use of the Karen were incompatible with World Heritage status and may jeopardize listing as a "natural" site. Never were the Karen meaningfully involved in the nomination process, and no efforts were made to recognize their cultural values and relationship with the land within the OUV of the site. On the contrary, some of the actions

¹³⁰ OHCHR 2013.

¹³¹ Also see EMRIP 2015, 21: "States should ensure that the benefits arising from the use of the lands, territories and resources of indigenous peoples' as World Heritage sites are defined by and genuinely accrue to the indigenous peoples concerned, in a fair and equitable manner."

¹³² OHCHR 2013.

¹³³ See OHCHR 2022a (particularly communications OTH 8/2019, OTH 23/2020, and OTH 209/2021, concerning Kaeng Krachan Forest Complex, and OTH 262/2021, concerning Ngorongoro Conservation Area). All communications were sent jointly with other special procedures of the Human Rights Council.

¹³⁴ OHCHR 2022a (communications concerning Kaeng Krachan Forest Complex to IUCN [OTH 7/2019; OTH 22/2020]; and concerning Ngorongoro Conservation Area to IUCN [OTH 263/2021] and ICOMOS [OTH 264/2021]).

¹³⁵ OHCHR 2022a (communications to Thailand [THA 2/2019, THA 4/2020, THA 4/2021], Tanzania [TZA 3/2021], and Argentina [UNHRC 2012, paras. 50, 97]). See also the communications to Sweden (SWE 2/2022), Botswana (BWA 3/2021), and Denmark (DNK 2/2021), addressing development projects threatening Indigenous sites.

¹³⁶ See the Committee on the Elimination of Racial Discrimination's (CERD) letters to Thailand of 9 March 2012, 3 October 2016, 17 May 2017, 29 August 2019, and 24 November 2020, which are all available at CERD 2022.

¹³⁷ OHCHR 2014; 2022a (communications OTH 8/2019, OTH 23/2020, and OTH 209/2021).

during the nomination process amounted to an intentional destruction of Karen cultural heritage.¹³⁸ Significant concerns existed among the Karen that World Heritage designation might lead to the destruction of their traditional way of life, loss of land, loss of access to natural resources, problems resulting from increased tourism, and heightened tensions between the local communities and the government.¹³⁹

In November 2014, prior to the World Heritage Committee's thirty-ninth session in Bonn where the nomination was first considered, the Office of the UN High Commissioner for Human Rights (OHCHR) submitted a briefing paper to the committee and the IUCN, which outlined the human rights abuses being faced by the Karen and their concerns about the nomination process, and made recommendations about how to address the human rights concerns.¹⁴⁰ Among other things, the OHCHR urged the committee to ensure that the rights of the Karen communities to remain in the KKFC would be respected and that they would not be evicted from their land; that comprehensive consultations would be held with the communities, based on full information on positive and negative effects of World Heritage listing; that the Karen communities would be able to participate in the management of the World Heritage site; that clear guidelines would be established on the use of land and natural resources by the Karen communities with the participation of the Karen; and that an impartial dispute resolution mechanism would be established that is accessible by the Karen. The OHCHR underlined that it did not object to the designation of the KKFC as a World Heritage site in principle but sought to ensure that measures were taken to protect the rights of the Karen before the nomination was approved.¹⁴¹

First steps toward aligning the World Heritage Convention with the UNDRIP

Initial efforts by UNESCO and the World Heritage Committee to align the World Heritage Convention with the UNDRIP occurred in the context of the Convention's fortieth anniversary in 2012, celebrated under the theme World Heritage and Sustainable Development: The Role of Local Communities. In a 2011 decision on the celebration of the anniversary, the committee noted that considerations relating to Indigenous peoples "should be included in the theme of the 40th anniversary", acknowledging the statements of the UNPFII at the committee's thirty-fourth and thirty-fifth sessions.¹⁴² This led to the organization of the already mentioned expert workshop in Copenhagen, the results of which were then referenced in several of the working documents prepared by the Secretariat for the committee's 2013 session in Phnom Penh, most significantly one for the agenda item entitled "Revision of the Operational Guidelines."¹⁴³ While the issue was only discussed briefly at the Phnom Penh session, and several states parties expressed strong reservations and opposition to including provisions relating to Indigenous peoples in the Operational Guidelines,¹⁴⁴ the committee passed a decision saying that it would re-examine the recommendations of the Copenhagen workshop following the adoption of the UNESCO policy on

¹³⁸ IWGIA, IIPFWH, and Indigenous Peoples of Africa Co-ordinating Committee 2022, 2. They note that the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, Doc. 32C/Res. 33, 17 October 2003, explicitly "addresses intentional destruction of cultural heritage including cultural heritage linked to a natural site" (Art. II.1).

¹³⁹ OHCHR 2014, 2015; IWGIA et al. 2022.

¹⁴⁰ OHCHR 2014; see also OHCHR 2015 (supplementary information submitted in April 2015).

¹⁴¹ OHCHR 2014.

¹⁴² WHC 2011b, 269 (Decision 35 COM 12D). Another decision "encouraged" states parties to "respect the rights of Indigenous peoples when nominating, managing and reporting on World Heritage sites" and to involve them in decision making, monitoring, and evaluating the state of conservation of sites. (Decision 35 COM 12E).

¹⁴³ WHC 2013a.

¹⁴⁴ Disko 2014, 555.

Indigenous peoples.¹⁴⁵ The issue thus remained on the committee's agenda in the following years, while the IUCN and the World Heritage Centre increasingly referred to the need to consider the rights and interests of Indigenous peoples in their advice and draft decisions prepared for the committee,¹⁴⁶ resulting in a growing number of committee decisions calling on individual states parties to enhance the role of Indigenous peoples in the conservation and management of specific World Heritage sites.

2015 Amendments to the Operational Guidelines

The World Heritage Committee's thirty-ninth session in Bonn in 2015 was highly significant for Indigenous peoples as the committee for the first time introduced references to Indigenous peoples into the Operational Guidelines. It also approved a comprehensive policy for the integration of a sustainable development perspective into the processes of the World Heritage Convention, which promotes a human rights-based approach to World Heritage conservation and emphasizes the importance of respecting, consulting, and involving Indigenous peoples in the protection of World Heritage, in line with international standards such as the UNDRIP.¹⁴⁷ At the same time, the discussions during the session were highly illustrative of the hurdles and resistance Indigenous peoples and UN human rights mechanisms are facing in demanding respect for Indigenous peoples' rights in the implementation of the Convention, and the dismissive, if not hostile, attitude toward human rights by many of the committee's members.

The debate on the KKFC was a good example of these discrepancies and contradictions. The OHCHR's intervention was successful insofar as the World Heritage Committee decided to refer the nomination back to the state party in order to "allow it to: (a) Address in full the concerns that have been raised by the OHCHR concerning Karen communities within the Kaeng Krachan National Park including the implementation of a participatory process to resolve rights and livelihoods concerns."¹⁴⁸ However, the committee voted against adopting a clause that would have required Thailand to "achieve a consensus of support for the nomination that is fully consistent with the principle of free, prior and informed consent."¹⁴⁹ This clause was contained in the draft decision prepared by the IUCN but deleted at the request of Vietnam, whose delegate declared that the reference to FPIC was "number one, not necessary, and number two, Madam Chair: *we are here at a prestigious Committee of culture and heritage, we are not in Geneva on the Human Rights Council, Madam Chair.*"¹⁵⁰ Only one committee member – Portugal – spoke up against this notion. Instead of calling for the FPIC of the Karen communities, the committee asked Thailand to "reach the widest possible support of local communities, governmental, non-governmental and private organizations and other stakeholders for the nomination."¹⁵¹

A few days later, as a first response to the recommendations of the Copenhagen expert workshop and the persistent advocacy of UN human rights mechanisms, the World Heritage Committee approved amendments to the Operational Guidelines adding Indigenous peoples to the list of potential "partners" in the protection of World Heritage and "encouraging" states to demonstrate their FPIC when nominating sites to the World

¹⁴⁵ WHC 2013b, 235 (Decision 37 COM 12.II).

¹⁴⁶ See IUCN 2013, ii–iii; Larsen, Oviedo, and Badman 2014.

¹⁴⁷ WHC 2015b, 2015c.

¹⁴⁸ WHC 2015f, 158 (Decision 39 COM 8B.5, para. 2).

¹⁴⁹ IUCN 2015, 50.

¹⁵⁰ For a video recording of the statement, see "World Heritage," *Youtube*, <https://www.youtube.com/watch?v=2cxqbXJAG4U&t=8699s> (accessed 22 August 2022) (emphasis added).

¹⁵¹ WHC 2015f, 158 (Decision 39 COM 8B.5, para. 2).

Heritage List.¹⁵² However, although the references to Indigenous peoples and to FPIC represented a significant breakthrough, the provision on FPIC was couched in non-obligatory language and therefore did not add much in terms of ensuring respect for Indigenous peoples' rights in the context of World Heritage nominations. This was also noted by the UNPFII representative Oliver Loode, who remarked in a statement to the committee that the language was "insufficient ... because it fails to create obligations for States," underlining that a "robust procedure" was needed ensuring that Indigenous peoples' rights under international law are respected, that they are effectively involved in nomination processes, and that their FPIC is obtained before sites on their lands are inscribed.¹⁵³

However, the discussions during the session revealed strong resistance by many states parties against acknowledging Indigenous peoples as rights holders and adopting regulations that would make their effective involvement in decision-making processes a mandatory requirement for states. Several states even contested the very concept of "Indigenous peoples," including some states that had endorsed the UNDRIP, such as France or Senegal.¹⁵⁴ The then Special Rapporteur Victoria Tauli-Corpuz commented in a statement to EMRIP: "From the reports I got, there were huge debates whether human rights is even a framework that should be used when designations of world heritage sites are done. There were even questions raised on who are indigenous peoples and suggestions that local communities be the concept used instead of indigenous peoples. How can a UN agency which is the main body dealing with questions of culture and cultural rights allow such backsliding in terms of the application of the human rights-based approach?"¹⁵⁵

The World Heritage Committee also rejected a draft amendment to the Operational Guidelines that would have required the World Heritage Centre to make all complete nominations publicly accessible upon receipt,¹⁵⁶ something that Indigenous peoples had been demanding for years.¹⁵⁷ Unless nominating states publish them voluntarily (which they often do not do¹⁵⁸), the submitted nominations are therefore still not accessible to affected Indigenous peoples or the general public before sites are listed,¹⁵⁹ a fact that is clearly not compatible with Indigenous peoples' right to FPIC.¹⁶⁰ If the committee's decision not to publish submitted nominations before their approval was inconsistent with the new reference to FPIC in the Operational Guidelines, it stood in even sharper contrast to the committee's endorsement, also at the Bonn session, of the (then draft) World Heritage Sustainable Development Policy (WH-SDP), which emphasizes the fundamental necessity of respecting, protecting, and promoting human rights in the implementation of the World Heritage Convention.¹⁶¹

¹⁵² WHC 2015a, paras. 40, 123. For background, see WHC 2015e, paras. 28–31.

¹⁵³ UNPFII 2015. Emblematic for the WHC's attitude toward the UN human rights system was the fact that the UNPFII representative was not given a seat in the plenary hall and had to deliver his statement from the non-governmental organization (NGO) microphone on the balcony.

¹⁵⁴ Endorois Welfare Council, Saami Council, and IWGIA 2015; UNHRC 2015; Liuzza 2021, 14–18. For the French position, see WHC 2015d, 8–9.

¹⁵⁵ UNHRC 2015.

¹⁵⁶ For details, see Endorois Welfare Council, Saami Council, and IWGIA 2015.

¹⁵⁷ See, e.g., Copenhagen Expert Workshop 2012, para. 3a.

¹⁵⁸ For example, in the case of the Kaeng Krachan Forest Complex (inscribed in 2021), the nomination files were not published by the state party before the site was listed, leaving the Karen communities unable to challenge some of the claims made therein, such as claims regarding consultations with them.

¹⁵⁹ See WHC 2021a, para. 140.

¹⁶⁰ EMRIP 2015, 13–14; also see Vrdoljak 2018, 270.

¹⁶¹ WHC 2015c.

WH-SDP

Prepared by the World Heritage Centre at the request of the World Heritage Committee, the WH-SDP was formally adopted by the General Assembly of States Parties to the Convention in November 2015. Its adoption represents a significant shift in the implementation of the Convention and a crucial step toward aligning it with the UNDRIP and UNESCO's purpose according to Article 1 of its Constitution. The WH-SDP recognizes the need to "view conservation objectives, including those promoted by the World Heritage Convention, within a broader range of economic, social and environmental values and needs encompassed in the sustainable development concept" and is aimed at "achiev[ing] the appropriate balance, integration and harmonization between the protection of OUV and the pursuit of sustainable development objectives."¹⁶² The policy underlines that "[t]he human rights embedded in the UN Charter and the range of broadly ratified human rights instruments reflect fundamental values that underpin the very possibility for dignity, peace and sustainable development" and that "[r]ecognizing rights and fully involving indigenous peoples and local communities, in line with international standards is at the heart of sustainable development."¹⁶³ It also states that, in applying a sustainable development perspective within the implementation of the Convention, "the close links and interdependence of biological diversity and local cultures within the socio-ecological systems of many World Heritage properties" should be recognized.¹⁶⁴

The WH-SDP makes explicit reference to the obligation to promote and protect human rights in Article 1 of the UNESCO Constitution and to UNESCO's commitment to the mainstreaming of human rights in its work and adopting a human rights-based approach to programming.¹⁶⁵ To ensure policy coherence in conserving and managing World Heritage properties, it calls upon states parties to "commit to uphold, respect and contribute to the implementation of the full range of international human rights standards as a pre-requisite for effectively achieving sustainable development" and to "[e]nsure that the full cycle of World Heritage processes from nomination to management is compatible with and supportive of human rights."¹⁶⁶ What is more, it calls upon states to "[a]dopt a rights-based approach, which promotes World Heritage properties as *exemplary places for the application of the highest standards for the respect and realization of human rights*."¹⁶⁷

In regard to Indigenous peoples specifically, the WH-SDP provides, *inter alia*, that states parties should respect Indigenous peoples' rights in nominating, managing, and reporting on World Heritage properties; ensure adequate consultations, the FPIC, and equitable and effective participation of Indigenous peoples where World Heritage nomination, management, and policy measures affect them; actively promote Indigenous peoples' initiatives to develop equitable governance arrangements, collaborative management systems, and, when appropriate, redress mechanisms; and contribute to the building of a sense of shared responsibility for heritage among Indigenous peoples by recognizing both universal and local values within management systems for World Heritage properties.¹⁶⁸

¹⁶² WHC 2015c, paras. 2, 9.

¹⁶³ WHC 2015c, para. 7, 21. The UNDRIP is highlighted as an example for applicable international standards.

¹⁶⁴ WHC 2015c, para. 8; see also paras. 18 and 19, which call upon states to "[r]ecognize that World Heritage properties ... often play a direct role in providing food, clean water and medicinal plants" and to "[r]ecognise, respect, and include the values as well as cultural and environmental place-knowledge of local communities."

¹⁶⁵ WHC 2015c, para. 20. UNESCO has a Strategy on Human Rights, adopted by the General Conference in 2003, that is aimed at integrating a human rights-based approach into all of UNESCO's programs and activities. UNESCO 2003, paras. 10–15.

¹⁶⁶ WHC 2015c, para. 20.

¹⁶⁷ WHC 2015c (emphasis added).

¹⁶⁸ WHC 2015c, para. 22.

While the policy is aimed primarily at the states parties, it does note that “the implementation of its provisions will often require the contribution and support of the secretariat, the advisory bodies and other relevant bodies.”¹⁶⁹ Moreover, in adopting the policy, the General Assembly requested the secretariat and the advisory bodies to develop proposals for changes to the Operational Guidelines that would translate the principles of the policy into specific operational procedures.¹⁷⁰ This necessity was also emphasized by UNPFII representative Oliver Loode, who noted in a statement to the World Heritage Committee that the effectiveness of the policy would depend on “the introduction of specific operational procedures that not only encourage but actually require States Parties to comply with international standards regarding the rights of indigenous peoples,” adding that the Secretariat should ensure the full and effective participation of Indigenous peoples when developing proposals for amendments to the Operational Guidelines to ensure consistency with the UNDRIP.¹⁷¹

2019 Amendments to the Operational Guidelines

At the forty-third session of the World Heritage Committee in 2019 in Baku, the World Heritage Centre submitted a set of proposed amendments to the committee aimed at mainstreaming the WH-SDP into the Operational Guidelines, including a number of amendments regarding Indigenous peoples.¹⁷² Regrettably, the center failed to involve Indigenous peoples in the development of these proposals, a fact that was criticized by Indigenous participants in the Baku session as being inconsistent with the principle of FPIC and Article 41 of the UNDRIP.¹⁷³ However, a member of the Indigenous Peoples’ Caucus (which was exceptionally large due to the committee’s consideration of two Indigenous-led nominations), Max Ooft from Suriname, was at least allowed to participate in the committee’s working group that discussed the proposed amendments, and he successfully argued for some improvements.¹⁷⁴

The working group, and, subsequently, the World Heritage Committee, approved a range of amendments to the Operational Guidelines that, although still mostly couched in non-obligatory language, constituted another significant step forward in the efforts to align the implementation of the World Heritage Convention with the UNESCO Constitution and the UNDRIP. Among other things, provisions were added encouraging states parties to “adopt a human rights-based approach ... in the identification, nomination, management and protection processes of World Heritage properties” and to mainstream international human rights standards into their activities related to the Convention (the first ever references to human rights in the guidelines).¹⁷⁵ In regard to Indigenous peoples, a provision was added providing that states shall seek the FPIC of Indigenous peoples before including sites in Indigenous peoples’ territories on their “Tentative Lists” (inventories of sites that states intend to nominate in the future) and another one saying that states should implement management activities for World Heritage sites in close collaboration with Indigenous peoples “by developing, when appropriate, equitable governance arrangements, collaborative management systems and redress mechanisms.”¹⁷⁶ The committee also added a

¹⁶⁹ WHC 2015c, para. 12.

¹⁷⁰ WHC 2015g, 8 (Res. 20 GA 13, para. 8). Similarly, WHC 2015f, 7 (Committee Decision 39 COM 5D, para. 10).

¹⁷¹ UNPFII 2015.

¹⁷² WHC 2019a.

¹⁷³ IIPFWH 2019a.

¹⁷⁴ IIPFWH 2019b, 2–4.

¹⁷⁵ WHC 2019b, paras. 12, 14bis.

¹⁷⁶ WHC 2019b, paras. 64, 117.

reference to the then newly adopted UNESCO Policy on Engaging with Indigenous Peoples,¹⁷⁷ encouraging states to mainstream its principles into the Convention's implementation.¹⁷⁸

A first major litmus test of the World Heritage Committee's new commitments to Indigenous rights was its renewed consideration of the KKFC nomination, which had been resubmitted by Thailand. After a highly contentious debate, the committee once again referred the nomination back to the state party due to continued concerns of the OHCHR and Indigenous organizations over the human rights situation in the site and Thailand's continued failure to seek the FPIC of the Karen communities.¹⁷⁹ The committee's referral decision asked Thailand to "demonstrate that all concerns have been resolved, in full consultation with the local communities, in accordance with paragraph 123 of the Operational Guidelines [on Indigenous peoples' FPIC]."¹⁸⁰ Shortly thereafter, the committee approved two Indigenous-led nominations, which can both serve as examples of good faith collaboration and genuine partnership between governments and Indigenous peoples in the nomination and protection of World Heritage sites, based on mutual respect, trust, and transparency. The first of these sites – Budj Bim in south-eastern Australia – was inscribed as a living cultural landscape in recognition of the significance of the complex aquaculture system developed by the Gunditjmarra people. The whole site is Aboriginal owned and/or managed and is managed to respect the customary and legal rights and obligations of the Traditional Owners, who apply customary knowledge and scientific approaches through two management regimes: a cooperative arrangement with the Victorian government for Budj Bim National Park and the Indigenous ownership of two Indigenous Protected Areas.¹⁸¹ The other site – Writing-on-Stone / Áísínai'pi in Canada – was listed as a sacred cultural landscape that provides exceptional testimony to the living cultural traditions of the Blackfoot people. The statement of OUV notes that the Blackfoot people are "fully participating in the management of Writing-on-Stone / Áísínai'pi, while ensuring appropriate management practices and continuous access for traditional and cultural practices"¹⁸² and that the nomination dossier contains a detailed description of Blackfoot engagement throughout the nomination process and a statement of support from the chiefs of the Blackfoot Confederacy.¹⁸³

Continued violations of Indigenous peoples' rights, including by the World Heritage Committee

If there was hope that a new era had begun at the 2019 session in which human rights are upheld by the World Heritage Committee, this was more than shattered in 2021 at the committee's forty-fourth session in Fuzhou (online meeting). Chaired by China, the session was characterized by an extraordinary lack of regard for the views and concerns of Indigenous peoples and civil society organizations and a lack of possibilities for them to meaningfully participate in the committee's discussions.¹⁸⁴ Throughout the meeting,

¹⁷⁷ UNESCO 2017. The policy was approved by UNESCO's Executive Board in October 2017. It reaffirms UNESCO's commitment to the full realization of the provisions of the UNDRIP and its intention to implement the UNDRIP across all relevant program areas. Many of the policy's provisions explicitly refer to cultural and natural heritage sites.

¹⁷⁸ WHC 2019b, 14bis.

¹⁷⁹ See WHC 2019d, 333–45, 527–28.

¹⁸⁰ WHC 2019c, 214 (Decision 43 COM 8B.5).

¹⁸¹ WHC 2019c, 237–40 (Decision 43 COM 8B.14).

¹⁸² WHC 2019c, 260–61 (Decision 43 COM 8B.25).

¹⁸³ Canada 2018.

¹⁸⁴ Disko 2022.

representatives of Indigenous organizations and NGOs were given the floor only after the committee had already adopted its decisions on the various agenda items and were thus completely excluded from the decision-making process.¹⁸⁵ Their speaking time was in most cases restricted to just one minute.

The World Heritage Committee once again considered the nomination of the KKFC, which was resubmitted by Thailand for a third time without having resolved the human rights concerns concerning the Karen communities in the KKFC and without having obtained the FPIC of the Karen. With Thailand newly elected to the committee and strongly lobbied by the Thai government to approve the nomination,¹⁸⁶ the committee inscribed the KKFC on the World Heritage List despite being fully aware – from numerous communications of UN human rights mechanisms, Karen organizations, and international NGOs as well as the advisory body evaluation of the IUCN¹⁸⁷ – that the human rights violations in the KKFC were ongoing and had indeed escalated.¹⁸⁸ UN human rights mandate holders had repeatedly warned the committee that the “human rights violations [were] of a continuing nature”; that “ongoing criminalisation and harassment of Karen community members and human rights defenders in 2021 undermine[d] the possibility to conduct good faith consultations”; that there was a “lack of concrete measures to address land tenure rights and to recognise the traditional rotational agricultural practices of the Karen”; and that “inclusive and effective participation of indigenous peoples, equitable governance arrangements, collaborative management systems and redress mechanisms ha[d] not been established.”¹⁸⁹ In a press release issued a few days before the committee’s decision, they warned: “Should the nomination as heritage status be approved it would perpetuate the denial of the Karen’s right to remain on their traditional lands and carry out their traditional livelihood activities based on rotational farming.”¹⁹⁰

UN Special Rapporteur Calí Tzay attended the World Heritage Committee’s session to raise the ongoing human rights concerns with the committee, but not even he, a UN official with a mandate to engage and cooperate with governments and relevant UN agencies in order to enhance respect for the rights of Indigenous peoples, was allowed to speak before the committee had already approved the nomination. He therefore emphasized in his statement: “It is regrettable that your current working methods do not allow indigenous peoples to participate in decision making processes which clearly affect their rights and the future of their lands and resources. To ensure credibility, your working methods need to be brought in line with the United Nations Declaration on the Rights of Indigenous Peoples.”¹⁹¹ A representative of the Indigenous Peoples’ Caucus, Chrissy Grant from Australia, remarked in a statement following the inscription of the KKFC: “The decision represents one of the lowest points in the history of the Convention and indeed in the history of UNESCO. It tramples on the most fundamental principles and purposes of UNESCO, as well as those of the United Nations Charter. ... This decision is not the result of sound expert judgment based

¹⁸⁵ WHC 2022, 150, 363ff.

¹⁸⁶ See Disko 2022; G. Readfearn, “‘Low Point’ in World Heritage Committee History as Politics ‘Tramples’ Human Rights of the Karen People,” *The Guardian*, 6 August 2021, <https://www.theguardian.com/environment/2021/aug/06/low-point-in-world-heritage-committee-history-as-politics-tramples-human-rights-of-the-karen-people> (accessed 30 August 2022).

¹⁸⁷ IUCN 2021, 33–40.

¹⁸⁸ For the committee’s debate on the nomination, see WHC 2022, 356–69. The delegation of China argued that human rights issues were important, “[b]ut United Nations has this Human Rights Council to discuss human rights related issues. For this Committee, we would conduct our work based on scientific evidence and on our professional judgement.” WHC 2022, 365.

¹⁸⁹ OHCHR 2020, 2021a.

¹⁹⁰ OHCHR 2021b.

¹⁹¹ OHCHR 2021c.

on the purposes of this Convention, good heritage practice and the principles of the [WHSDP]. It is the result of highly politicized lobbying and horse-trading based on the economic interests of Committee members.”¹⁹²

It must be acknowledged that the World Heritage Committee also passed some decisions at the Fuzhou session in support of Indigenous peoples’ rights. Most notably, four decisions referred to the findings of an independent review commissioned by the World Wide Fund for Nature (WWF)¹⁹³ that had found evidence of serious human rights abuses against Indigenous communities by eco-guards at several World Heritage sites in Africa and Asia. In addition to expressing concern about the abuses, the committee requested the states parties concerned to implement actions to address the issues in accordance with relevant international standards and the WHSDP.¹⁹⁴ Indigenous participants in the Fuzhou session noted, however, that “the underlying cause of the human rights violations against Indigenous Peoples [was] the systemic denial of their customary rights to access and use their ancestral lands, territories and resources” and that the decisions of the committee, the advisory bodies, and UNESCO had “in many ways contributed to this denial, and may also have directly contributed to some of the violations described in the [independent review], for instance by encouraging ‘voluntary relocations’ of Indigenous Peoples or by identifying traditional resource use as a threat.”¹⁹⁵ The validity of this argument was underscored by the committee’s decision on Salonga National Park in the Democratic Republic of Congo, which once again reinforced the idea that the Yaelima Indigenous communities are a threat to the park and should thus be relocated. UNESCO’s and IUCN’s state of conservation reports and the decisions of the committee have for many years identified “Indigenous hunting, gathering and collecting” as a threat to the park and encouraged the “voluntary relocation” of Indigenous communities from the park.¹⁹⁶ The decision adopted by the committee in Fuzhou requests the state party to “pursue and accelerate the current process aimed at best preparing the relocation” of communities living within the park, cautioning only that relocations should follow the principle of FPIC.¹⁹⁷

A similar case is that of the Ngorongoro Conservation Area (NCA) in Tanzania, where the World Heritage Committee, UNESCO, and the advisory bodies have for many years identified the livelihood activities and growing population of the area’s Indigenous Maasai residents as major threats to the OUV of the site and actively encouraged Tanzania to promote their “voluntary relocation” from the NCA. Based upon their recommendations and requests, the Tanzanian government has imposed multiple restrictions on livestock grazing and crop cultivation, which have led to serious food insecurity and hunger among the Maasai.¹⁹⁸ Additionally, the government has recently undertaken a review of the NCA’s existing “multiple land use model” (MLUM) and is planning to implement a new MLUM and accompanying resettlement scheme that would radically rezone the NCA, significantly reduce the land available for pastoralism, and remove over 80,000 of the NCA’s Indigenous residents.¹⁹⁹ These plans were developed without the meaningful participation of the Maasai, who have largely been excluded from the management and decision

¹⁹² IIPFWH 2021a; WHC 2022, 369.

¹⁹³ Pillay, Knox and MacKinnon 2020.

¹⁹⁴ WHC 2021b, 68 (Decision 44 COM 7A.44, Salonga National Park), 71 (44 COM 7A.46, General decision DR Congo), 272 (44 COM 7B.174, Sangha Trinational), and 287 (44 COM 7B.188, Chitwan National Park).

¹⁹⁵ IIPFWH 2021b.

¹⁹⁶ For details, see IWGIA, IIPFWH, and IPACC 2022, para. 13.

¹⁹⁷ WHC 2021b, 69 (Decision 44 COM 7A.44, para. 8j).

¹⁹⁸ Olenasha 2014; Maasai Indigenous Residents 2022.

¹⁹⁹ Currier and Mittal 2021; Maasai Indigenous Residents 2022.

making of the NCA. At the Fuzhou session, the committee not only passed a decision expressing concern over “the continued conflicts with the communities living in the property” but also reiterated its concern over the “significant increase in the number of people residing in the property since its inscription [in 1979].”²⁰⁰ It called for an “equitably governed consultative process to identify long term sustainable interdisciplinary solutions to address these issues, with participation of all rightsholders and stakeholders” and also requested Tanzania to ensure that the General Management Plan for the NCA would be “finalized in consultation with, and with the FPIC as appropriate of local stakeholders and rightsholders.”²⁰¹

In February 2022, in the midst of reports that the Tanzanian government was beginning with the implementation of “plans for resettlement, forced evictions, home demolitions and additional restrictions” by the end of the month,²⁰² Special Rapporteur Calí Tzay and seven other special rapporteurs of the UN Human Rights Council sent a remarkable set of letters to the World Heritage Committee, the IUCN, and ICOMOS, expressing concern over their roles in the framework of these initiatives.²⁰³ Noting that the plans were ignoring the close relationship of the Maasai with their lands, territories, and resources and, if pursued, could jeopardize the physical and cultural survival of the Maasai, the special rapporteurs highlighted that the plans were “allegedly put in place following a joint report of the UNESCO World Heritage Center and other advisory bodies ... indicating that stringent measures were needed to control population growth in the NCA.”²⁰⁴ While acknowledging the committee’s calls for the effective participation of the Maasai in decision-making processes, the special rapporteurs urged the committee and its advisory bodies to “consider carefully the implications of promoting and supporting plans where several concerns have been raised that [their] implementation may violate the rights of indigenous peoples.”²⁰⁵ In closing, they wrote: “We wish to recall that respect for human rights is a core principle enshrined in the United Nations Charter. While recognising that the Tanzanian State has the primary obligation to ensure full compliance with international human rights norms, including the UNDRIP, the right to adequate housing and cultural rights, UN agencies and programmes should set an example when it comes to human rights compliance.”²⁰⁶

Conclusions and recommendations

Despite the World Heritage Committee’s adoption of policy and operational guidelines aimed at integrating a human rights-based approach and ensuring respect for Indigenous peoples’ rights in the implementation of the World Heritage Convention, the management of many World Heritage sites continues to be marked by an exclusion of Indigenous peoples from the decision-making processes affecting them, a lack of respect for their relationship to the land, a lack of protection of their traditional livelihoods, and disregard for their cultural heritage. Human rights violations against Indigenous peoples continue to occur unabated in

²⁰⁰ WHC 2021b, 267–68 (Decision 44 COM 7B.171, para. 10).

²⁰¹ WHC 2022, 267–68.

²⁰² IWGIA 2022; OHCHR 2022b, 1, 6.

²⁰³ OHCHR 2022a (communications OTH 262/2021 [Committee], OTH 263/2021 [IUCN], and OTH 264/2021 [ICOMOS]).

²⁰⁴ OHCHR 2022b, 1. The letter refers specifically to the report of the 2019 reactive monitoring mission (WHC 2019e). For background, see Maasai Indigenous Residents 2022.

²⁰⁵ OHCHR 2022b, 7–8.

²⁰⁶ OHCHR 2022b, 7–8. UNESCO responded to the letter by denying all responsibility and liability, arguing that neither the WHC nor the UNESCO Secretariat had at any time asked for the displacement of the Maasai people. UNESCO 2022a, 2022b.

many sites. The committee is “in many ways enabling, and sometimes even driving, these violations,” as Indigenous observers noted at the 2021 session of the committee in Fuzhou – for instance, by designating sites as purely “natural sites” without recognizing Indigenous peoples’ cultural values, by identifying Indigenous resource use as a threat, or by encouraging the “voluntary relocation” of Indigenous peoples from their ancestral lands.²⁰⁷ Moreover, although the committee has adopted policies affirming that states shall ensure the FPIC and the effective participation of Indigenous peoples where World Heritage nomination, management, and policy measures affect them, it continues to violate these norms in its own decision-making processes, as the inscription of the KKFC on the World Heritage List has made abundantly clear. The case of the KKFC has also demonstrated that the committee, in inscribing sites on the World Heritage List, is ready to ignore persistent and ongoing human rights violations against Indigenous communities in nominated sites as well as concerns that a World Heritage listing might escalate the violations, even when repeatedly urged by UN human rights mechanisms to provide time for the human rights concerns to be resolved.

This blatant disregard by the World Heritage Committee for human rights strongly conflicts with the purpose of UNESCO, according to Article 1 of its Constitution, and the purposes of the UN as a whole,²⁰⁸ severely damaging the credibility and reputation of both the World Heritage Convention and UNESCO. As a UN specialized agency, UNESCO has an obligation to cooperate with the UN in accomplishing the purposes set forth in Article 55 of the UN Charter, which include the promotion of “universal respect for, and observance of, human rights and fundamental freedoms for all”²⁰⁹ and can be said to be “the *raison d’être* of any specialised agency.”²¹⁰ The committee’s lack of regard for the views of the UN human rights system – starkly illustrated by its refusal to let UN Special Rapporteur Calí Tzay speak before taking its decision on the KKFC – fundamentally violates the provisions of the Charter on the cooperation between the UN and its specialized agencies for the achievement of the purposes set forth in Article 55.²¹¹ It also violates the Relationship Agreement between the United Nations and UNESCO, which reaffirms the duty of UNESCO to fully cooperate with the UN in promoting the objectives of Article 55 and explicitly provides that representatives of the UN shall be invited to attend meetings convened by UNESCO and participate in the deliberations.²¹²

The World Heritage Committee’s disregard for Indigenous peoples’ human rights is also incompatible with the responsibility of the UN system to continuously promote and protect the rights of Indigenous peoples as recognized in the UNDRIP.²¹³ Under Article 41 of the Declaration, the organs and specialized agencies of the UN and other intergovernmental organizations, including UNESCO and the governing bodies of the World Heritage Convention, are required to contribute to the full realization of the Declaration through the mobilization of financial cooperation and technical assistance and the establishment of ways and means of ensuring participation of Indigenous peoples on issues affecting them. Under Article 42, UN specialized agencies, including at the country level, and states shall promote respect for, and full application of, the provisions of the Declaration and follow up on its effectiveness. UNESCO’s Policy on Engaging with Indigenous Peoples affirms that “[c]

²⁰⁷ IIPFWH 2021b.

²⁰⁸ Charter of the United Nations, 26 June 1945, 1 UNTS 16 (UN Charter), Art. 1 as well as Arts. 55, 56.

²⁰⁹ UN Charter, Art. 55c.

²¹⁰ Rajagopal 1993, 94; see also McCorquodale 2009, 156.

²¹¹ UN Charter, Arts. 56–59, 62–63, 70.

²¹² Agreement between the United Nations and the United Nations Educational, Scientific and Cultural Organization, 14 December 1946, 1 UNTS 238, Arts. II.1, IV.

²¹³ UNDRIP, preambular para. 20, Arts. 41, 42.

onsistent with Article 41 of the UNDRIP, UNESCO, as a specialized agency of the UN, is ‘committed to the full realization of the provisions of the Declaration’.”²¹⁴

Considering the World Heritage Committee’s continued failure to act in accordance with these obligations and commitments and the unacceptable disconnect between the World Heritage Convention and the UN human rights system, we suggest that the General Assembly of States Parties and UNESCO use the occasion of the fiftieth anniversary of the Convention to make a concerted effort to ensure that the Convention is implemented in accordance with the human rights purposes of the UN Charter and the UNESCO Constitution and the standards affirmed in the UNDRIP. This would also be in line with the General Assembly’s ambition and expectation for World Heritage sites to be “exemplary places for the application of the highest standards for the respect and realization of human rights.”²¹⁵ More concretely, we recommend actions to (1) improve the committee’s cooperation with the UN human rights system; (2) enhance respect for Indigenous peoples’ rights to participation and FPIC in the Convention’s processes; (3) enable the provision of Indigenous expert advice to the committee; and (4) ensure that Indigenous peoples’ own values and perspectives are consistently recognized in the OUV of Indigenous sites.

First, given the World Heritage Committee’s inadequate cooperation with UN human rights mechanisms, we consider it imperative that the General Assembly of States Parties formalize the committee’s relationship with the UN human rights system. Engaging constructively with human rights mechanisms expressing concerns about human rights violations in World Heritage sites simply cannot be left to the discretion of the committee’s chairperson. We therefore agree with suggestions that the OHCHR be installed as a “standing advisory body for human rights compliance,”²¹⁶ with a formal mandate to provide information and advice on human rights issues to the committee and support it in addressing human rights problems in existing and potential new World Heritage sites. The OHCHR could thus fulfill the role of an “independent grievance mechanism for [human rights] violations at World Heritage sites.”²¹⁷ The committee should be required to engage and collaborate with the OHCHR in a proactive, constructive, and consensual manner, with a view to ensuring that “the full cycle of World Heritage processes from nomination to management is compatible with and supportive of human rights” as the WH-SDP demands.²¹⁸ There should also be a stipulation ensuring that World Heritage nominations raising the concern of UN human rights mechanisms are not approved by the committee before the concerns have been resolved to the satisfaction of the OHCHR. Written submissions by the OHCHR, as well as other human rights bodies, should be actively encouraged and made publicly available on UNESCO’s website unless this is not wanted by the submitters. During committee meetings, the OHCHR should have a right to speak and engage in the deliberations on any agenda item under discussion before decisions are taken by the committee. States parties should be required to enable country visits by UN human rights mandate holders to assess the human rights situation in World Heritage sites.²¹⁹

Second, considering the continued violations of Indigenous peoples’ right to FPIC in the nomination and inscription of World Heritage sites, as well as other processes of the World

²¹⁴ UNESCO 2017, para. 7; similarly, see paras. 3, 11.

²¹⁵ WHC 2015c, para. 20.

²¹⁶ Vrdoljak, Liuzza, and Meskell 2021, 19.

²¹⁷ The establishment of such a mechanism has been recommended by Special Rapporteur Calí Tzay. See UN 2022, para. 72(d).

²¹⁸ WHC 2015c, para. 20.

²¹⁹ UN 2022, para. 70(g).

Heritage Convention, we consider that the General Assembly and UNESCO should request that additional measures are taken to ensure that these rights are respected and upheld in the implementation of the Convention. We recommend that the World Heritage Centre be asked to develop, in collaboration with the OHCHR and the UNPFII and with the effective participation of Indigenous experts, practical guidance for states parties on obtaining, documenting, and demonstrating FPIC in the context of the Convention as well as guidance for the advisory bodies and committee members on how to determine whether the requirement of obtaining Indigenous peoples' FPIC has been met. To provide for Indigenous peoples' participation and FPIC in the context of World Heritage nominations from the very beginning of the process, a requirement should be added to the Operational Guidelines for "[h]uman rights impact assessments [to be] carried out together with indigenous peoples before the nomination process begins," as Special Rapporteur Calí Tzay has suggested.²²⁰ In order to make the submission of proof or evidence of the FPIC of Indigenous peoples affected by World Heritage nominations a procedural obligation for states, it should be made part of the "completeness check" by the World Heritage Centre, as recommended by the Copenhagen expert workshop.²²¹ Additionally, a provision should be added to the guidelines ensuring that all nomination documents are published on UNESCO's website upon receipt by the center so that Indigenous peoples and the general public are able to review the information therein and provide comments before the committee takes a decision.²²² It is also essential that the rules of procedure of the committee are changed to ensure that Indigenous peoples' representatives are able to effectively participate in discussions affecting Indigenous peoples and to speak for a fair length of time before the committee takes its decisions.

Third, we recommend that the General Assembly revisit the 2000–1 WHIPCOE proposal and consider the establishment of an Indigenous advisory mechanism under the terms of Article 8(3) of the World Heritage Convention,²²³ with a mandate to provide expert advice to the World Heritage Committee in all processes affecting Indigenous peoples aimed at ensuring that the rights of Indigenous peoples are fully respected in the implementation of the Convention and their priorities, values, and needs duly recognized, considered, and reflected. The exact role and functions of such a mechanism, the establishment of which was also proposed by the Copenhagen expert workshop,²²⁴ would need to be determined in full consultation with Indigenous peoples through an inclusive and transparent process. This process should involve the International Indigenous Peoples' Forum on World Heritage (IIPFWH), a network of Indigenous organizations and experts created in 2017 by Indigenous delegates at the committee's forty-first session in Kraków. The establishment of the IIPFWH was "noted" by the committee in one of the decisions adopted in Kraków,²²⁵ and UNESCO has since portrayed it as a "milestone"²²⁶ and "major step in engaging indigenous peoples from around the world in the field of World Heritage."²²⁷ However, the existence of the IIPFWH has not resulted in an enhanced role of Indigenous peoples in the committee's decision making. The IIPFWH does not fulfill any official functions under the Convention and does not receive any funding from the committee

²²⁰ UN 2022, para. 72(a).

²²¹ Copenhagen Expert Workshop 2012, Call to Action, para. 2a and Annex 3. On the completeness check, see WHC 2021a, para. 132.

²²² WHC 2015a, para. 3a.

²²³ In contrast, WHIPCOE was to be established by the WHC itself pursuant to the provisions of Art. 10(3) of the World Heritage Convention. WHC 2001c, 9.

²²⁴ See Copenhagen Expert Workshop 2012, Call to Action, para. 4.

²²⁵ WHC 2017, 13 (Decision 41 COM 7, para. 41).

²²⁶ UNESCO 2022c.

²²⁷ UNESCO 2018, 2019.

or UNESCO. During the 2021 committee session in Fuzhou (online meeting), the IIPFWH, too, was not given the floor on any agenda items before the committee had already adopted its decisions. If the IIPFWH is to be more than window dressing for UNESCO, it must be given official functions and supported by UNESCO and the General Assembly of States Parties through the “mobilization, inter alia, of financial cooperation and technical assistance,” in line with Article 41 of the UNDRIP.

Last but not least, we consider that the General Assembly and UNESCO should use the occasion of the fiftieth anniversary to initiate an in-depth reflection on the nature-culture divide and the application of the concept of OUV, with the participation of Indigenous experts from the different regions of the world. It should be recalled in this context that the World Heritage Convention was adopted before the recognition of Indigenous peoples’ rights by the UN and was drafted without the participation of Indigenous peoples; as a result, the conceptualization of heritage in the Convention does not reflect Indigenous peoples’ worldviews and perspectives. In particular, the dichotomy between natural and cultural heritage under the Convention is incompatible with Indigenous peoples’ holistic view of their heritage and, thus, inappropriate for the protection of World Heritage sites in Indigenous peoples’ territories. The classification of Indigenous sites as purely “natural sites,” without recognizing Indigenous peoples’ relationship to the land and cultural values in the OUV, has in many cases led to, or reinforced, management frameworks that undermine Indigenous peoples’ customary rights to their ancestral lands and resources, their livelihoods, and the protection of their cultural heritage. It is one of the underlying causes of the persistent human rights abuses against Indigenous peoples in many World Heritage sites.²²⁸

EMRIP has therefore called on the World Heritage Committee to “adopt changes to the criteria and regulations for the assessment of ‘outstanding universal value’ so as to ensure that the values assigned to World Heritage sites by indigenous peoples are fully and consistently recognized as part of their outstanding universal value.”²²⁹ An essential necessity in this regard is the reinsertion of references to cultural aspects and human interaction with the natural environment into the “natural criteria,” as the deletion of these references in 1992, has made it much more difficult and costly, and, in many cases, impossible, for states to recognize Indigenous peoples’ relationship to the land as an integral part of the OUV when they nominate protected areas to the World Heritage List. However, this is only one of the changes needed to enable an appropriate and consistent recognition of Indigenous peoples’ own values and perspectives when their ancestral lands and territories are declared “World Heritage sites.” Natural and cultural heritage should not be conceptualized as separate in such sites, and the committee should stop labelling them as purely “natural sites” if the Convention is to become an instrument that embraces and protects the cultural heritage of Indigenous peoples on an equal footing with that of the other peoples of the world and consistently supports, and not undermines, Indigenous peoples’ relationship to the land, cultural identities, traditional livelihoods, and heritage.

In adopting the UNDRIP, the UN member states recognized the vital contribution of Indigenous peoples to the world’s cultural diversity and to the common heritage of humankind.²³⁰ They also recognized the importance of respecting and promoting Indigenous peoples’ rights for the protection of their heritage, highlighting in the

²²⁸ IIPFWH 2021b.

²²⁹ EMRIP 2015, 23.

²³⁰ UNDRIP, preambular para. 3

declaration's preamble that "control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions."²³¹ The continued lack of regard and respect for the rights, cultures, and values of Indigenous peoples in many World Heritage sites and by the World Heritage Committee stands in sharp contrast to this and is incompatible with UNESCO's overarching mandate and principles as well as the principles of the WH-SDP. It throws into question whether the Convention is indeed an instrument "for all the peoples of the world"²³² and protects their heritage on a non-discriminatory basis, with significant implications for its credibility. Addressing this problem should be a top priority for states parties and UNESCO as the Convention reaches the turning point of its fiftieth anniversary.

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²³¹ UNDRIP, preambular para. 10; see also UNCHR 2000, Annex I ("Principles and Guidelines for the Protection of the Heritage of Indigenous People"): "The discovery, use and teaching of indigenous peoples' heritage is inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations, and its full protection."

²³² World Heritage Convention, preambular para. 5.

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