

# World Heritage Sites and Indigenous Peoples' Rights: An Introduction

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*Stefan Disko, Helen Tugendhat and Lola García-Alix*

In September 2007, following more than 20 years of negotiations between UN Member States and indigenous peoples' representatives, the UN General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). In the Preamble to the Declaration, the General Assembly emphasized that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples. In light of this special role, Articles 41 and 42 of the Declaration provide that the organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of the Declaration through, *inter alia*, financial and technical assistance; that ways and means of ensuring the participation of indigenous peoples on issues affecting them shall be established; and that the United Nations, its bodies and agencies and Member States shall promote respect for and full application of the Declaration and follow up on its effectiveness.<sup>1</sup> Responsibility to promote respect for the Declaration applies throughout the United Nations system and, in particular, to United Nations institutions whose activities affect indigenous peoples, including the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Heritage Committee.<sup>2</sup>

Of the roughly 1,000 areas designated as World Heritage sites under UNESCO's 1972 *Convention concerning the Protection of the World Cultural and Natural Heritage* (World Heritage Convention) as of 2014, a large number are fully or partially located within the traditional territories of indigenous peoples and are of great significance for their livelihoods and their spiritual, social and cultural well-being. While establishing an exact number of such 'indigenous sites' would require careful analysis, it is clear that there are close to 100 such sites, including well over a third of all sites designated as 'natural' World Heritage sites by the World Heritage Committee.<sup>3</sup>

What is also clear is that the impact of World Heritage sites on indigenous peoples has not always been positive. In his 2012 report to the UN General Assembly, the former UN Special

<sup>1</sup> The commitment of the United Nations to implementing the UNDRIP was reaffirmed in September 2014 on the occasion of the high-level meeting of the General Assembly known as the World Conference on Indigenous Peoples.

<sup>2</sup> Anaya 2012b, paras. 27, 41.

<sup>3</sup> As of July 2014, there were a total of 1,007 World Heritage sites, including 197 'natural' sites, 779 'cultural' sites and 31 'mixed' sites (listed because of both their natural and cultural significance).

Rapporteur on the rights of indigenous peoples, James Anaya, remarked that: “Indigenous peoples have expressed 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”. The Special Rapporteur highlighted this as a “recurring issue” that had arisen in the context of his communications with governments regarding specific allegations of human rights violations, as well as in the context of his reports examining the situation of indigenous peoples in particular countries.<sup>4</sup> Concerns regarding the human rights impacts of World Heritage sites have also been raised by the two other UN mechanisms with specific mandates concerning the rights of indigenous peoples: the UN Permanent Forum on Indigenous Issues (UNPFII)<sup>5</sup> and the Human Rights Council’s Expert Mechanism on the Rights of Indigenous Peoples (EMRIP).<sup>6</sup>

The purpose of this book is to analyze, through case studies of World Heritage sites in different parts of the world, the extent to which the principles of the UNDRIP are being fulfilled in the implementation of the World Heritage Convention. Case studies explore and document indigenous peoples’ experiences with World Heritage sites and in particular with the processes of the World Heritage Convention at both the national/site level and the international/UNESCO level. They examine the effects of World Heritage status on indigenous peoples’ lives and on the realization of their human rights (whether positive or negative) and the level of involvement of indigenous peoples in management and decision-making processes, especially their involvement in Convention processes such as the nomination of sites, the elaboration of management plans, reporting and monitoring, site evaluations and the decision-making of the World Heritage Committee. The book includes both examples of sites where indigenous peoples have been marginalized and their rights have been violated and examples where indigenous peoples’ experiences with the World Heritage system have generally been positive and where indigenous peoples have benefited from the World Heritage Convention in one way or another. There are also case studies of World Heritage sites where problems that have arisen are being addressed or have been overcome, and which could therefore serve as positive examples for other sites facing challenges.

It is our hope that the book will help to identify recurring issues and concerns, as well as systemic gaps and shortcomings, in order to contribute to discussions about what changes or actions are needed to address concerns and to ensure that the World Heritage Convention can play a consistently positive role in securing human rights. We hope that the book will stimulate debate and action towards making the implementation of the World Heritage Convention consistent with the UNDRIP, will contribute ideas on the way forward and will outline possible ways for the World Heritage Committee, UNESCO, States and indigenous peoples to address the concerns identified. Our vision is for the World Heritage Convention and the UNDRIP to be mutually reinforcing.

The production of the book coincided with, and was inspired by, two unrelated but thematically connected events: the World Heritage Convention’s 40<sup>th</sup> anniversary in 2012 and the World

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4 Anaya 2012b, paras. 33-42. The section of Anaya’s 2012 report discussing the World Heritage Convention is reproduced in Appendix 4 of this volume.

5 See, e.g., UNPFII 2010a, para. 131; UNPFII 2010b; UNPFII 2011, paras. 40-42; UNPFII 2013, para. 23; Cunningham 2012.

6 See, e.g., EMRIP 2011, Annex, para. 38; EMRIP 2012, p. 7 (Proposal 9: World Heritage Committee).

Conference on Indigenous Peoples in 2014. The World Heritage Convention's 40<sup>th</sup> anniversary was celebrated by UNESCO under the theme of "World Heritage and Sustainable Development: the Role of Local Communities" and was intended to provide a framework for focusing on "issues pertaining to the well-being and responsibilities of the local communities".<sup>7</sup> The celebration of the anniversary was meant to "present an opportunity for the international community involved in cultural and natural heritage conservation to reflect on the achievements of the *Convention* to date as well as to take stock of the challenges with which it is confronted".<sup>8</sup> The World Heritage Committee explicitly noted in a decision that considerations related to indigenous peoples, and in particular questions raised by the UN Permanent Forum on Indigenous Issues, "should be included in the theme of the 40<sup>th</sup> Anniversary".<sup>9</sup>

States Parties to the World Heritage Convention were encouraged by the Committee to "develop, support and carry out activities to promote the anniversary and to... mobilize various UNESCO related institutions, programmes and networks to join in celebrating the anniversary".<sup>10</sup> The Danish Agency for Culture acted on this request by partnering with IWGIA and the Government of Greenland to organize an international expert workshop on the World Heritage Convention and indigenous peoples, which took place in Copenhagen in September 2012 and involved, among others, several of the authors of articles contained in this book.<sup>11</sup> The workshop resulted in a Call to Action addressing the urgent need to make the implementation of UNESCO's World Heritage Convention consistent with the UNDRIP.<sup>12</sup>

In addition to the 40<sup>th</sup> anniversary, this book is intended as a contribution to the objectives of the World Conference on Indigenous Peoples (WCIP), a two-day high-level plenary meeting of the UN General Assembly held in New York City in September 2014, at the end of the Second International Decade of the World's Indigenous People (2005-2014). The official purpose of the World Conference was "to share perspectives and best practices on the realization of the rights of indigenous peoples, including to pursue the objectives of the United Nations Declaration on the Rights of Indigenous Peoples".<sup>13</sup> During the preparatory process for the WCIP, indigenous peoples organized a Global Indigenous Preparatory Conference, which took place in Alta, Norway in June 2013. One of the things highlighted by indigenous peoples in the *Alta Outcome Document* was the need for the World Heritage Committee, UNESCO and States to revise the World Heritage Convention's *Operational Guidelines* to ensure that the rights of indigenous peoples are respected in the nomination, designation, management and monitoring of World Heritage sites.<sup>14</sup> The outcome document of the WCIP itself, unanimously adopted by the General Assembly, reaffirms the solemn commitment of States to respect, promote and advance the rights of indigenous peoples set out in

7 UNESCO 2011a, para. 5.

8 UNESCO 2011a, para. 1.

9 Decision 35 COM 12D (2011), para. 10.

10 Decision 35 COM 12D (2011), para. 5.

11 For the report of the expert workshop see Disko and Tugendhat 2013.

12 See Appendix 3 at the end of this volume.

13 See General Assembly resolutions A/RES/65/198 (2011) and A/RES/66/296 (2012).

14 *Alta Outcome Document*, p. 5. Contained in UN Doc. A/67/994, Annex.

the UNDRIP, underlines the important role of the United Nations system in this regard and requests that the UN Secretary-General develop a system-wide Action Plan to ensure a coherent approach to the full realization of the provisions of the UNDRIP.<sup>15</sup> We hope that this book will be a useful reference for the United Nations, UNESCO and the World Heritage Committee in the elaboration and implementation of this Action Plan.

### **The United Nations Declaration on the Rights of Indigenous Peoples**

Solemnly proclaimed by the UN General Assembly in 2007 with the approval of an overwhelming majority of Member States,<sup>16</sup> and with the support of indigenous peoples worldwide, the *United Nations Declaration on the Rights of Indigenous Peoples* 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.<sup>17</sup> It represents, as affirmed by the UN Special Rapporteur James Anaya, “an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law”.<sup>18</sup> This echoes the text of the Declaration itself, according to which the rights recognized in the Declaration “constitute the *minimum standards* for the survival, dignity and well-being of the indigenous peoples of the world.”<sup>19</sup>

Recognizing 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 promote the inherent rights of indigenous peoples..., especially their rights to their lands, territories and resources”.<sup>20</sup> The Declaration therefore has, as Anaya notes, “an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights”.<sup>21</sup>

It is important to emphasize that the Declaration does not bestow a set of special or new rights upon indigenous peoples that are separate from the universally applicable fundamental human rights but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural, social and economic circumstances of indigenous peoples.<sup>22</sup> In doing so, it reflects and builds upon relevant provisions of human rights instruments

15 *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples* (UN Doc. A/RES/69/2).

16 The UNDRIP was adopted by a vote of 143 in favour to 4 against, with 11 abstentions. However, all 4 opposing States (Australia, Canada, New Zealand, United States) and two of the abstaining States (Colombia, Samoa) have since reversed their positions and formally endorsed the Declaration.

17 EMRIP 2011, p. 22; Anaya 2011, para. 69.

18 Anaya 2008, para. 85.

19 Art. 43 (emphasis added).

20 Preambular paras. 6 and 7.

21 Anaya 2008, paras. 86.

22 Anaya 2008, paras. 40, 86; Anaya 2013, para. 70.



*The UN General Assembly votes to adopt the Declaration on the Rights of Indigenous Peoples, United Nations, New York, 13 September 2007. Photo: Stefan Disko*

of general applicability, as interpreted and applied by United Nations and regional human rights bodies, as well as the standards contained in the *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention No. 169).

Therefore, while the UN Declaration itself is not a legally binding document, the standards found therein connect to existing State obligations under other human rights instruments that are legally binding on States. The Declaration builds upon the general human rights obligations of States under the *Charter of the United Nations*<sup>23</sup> and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties such as the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).<sup>24</sup> Since the adoption of the UN Declaration, the human rights treaty bodies that monitor the implementation

23 Under the UN Charter, a binding multilateral treaty of the highest order, the United Nations and its Member States have an obligation to respect and promote human rights on a non-discriminatory basis. See Arts. 1(2), 1(3), 55 and 56 of the UN Charter.

24 Anaya 2011, para. 68; Anaya 2013, paras. 63, 65.

of these treaties have frequently interpreted and applied their provisions in ways that reflect the Declaration, and often explicitly refer to the Declaration in so doing.<sup>25</sup>

Additionally, the UNDRIP “includes several key provisions which correspond to existing State obligations under customary international law”, as the International Law Association (ILA) found after an extensive survey of international and State practice in relation to the Declaration.<sup>26</sup> Norms of customary international law are binding on *all* States, irrespective of whether or not they have ratified any of the relevant treaties. They are also directly binding on international intergovernmental organizations.<sup>27</sup> While the Declaration as a whole cannot yet be considered as a statement of existing customary international law, the ILA notes that the provisions in the UNDRIP that do not yet correspond to customary international law nevertheless do express the aspirations of the international community to improve existing standards for the safeguarding of indigenous peoples’ human rights. The fact that States recognized them in a “Declaration” adopted within the framework of the obligations established by the *Charter of the United Nations* to promote and protect human rights on a non-discriminatory basis, and passed with overwhelming support by the UN General Assembly, results in “an expectation of maximum compliance by States and the other relevant actors”.<sup>28</sup>

Provisions of the UNDRIP which, according to the findings of the ILA, correspond not only to State obligations under the major international human rights treaties but also to existing norms of customary international law include provisions in the areas of self-determination, autonomy or self-government (including participatory rights), cultural rights and identity, land rights as well as reparation, redress and remedies.<sup>29</sup> While an in-depth discussion of the normative content of the UNDRIP is beyond the scope of this chapter, these five areas of rights will be briefly outlined below in order to better contextualize the issues raised in the case studies explored in this book.

## Self-determination

Article 3 of the UNDRIP affirms that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic,

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25 For a compilation of UN human rights treaty body jurisprudence pertaining to indigenous peoples, see Forest Peoples Programme 2013. Also see ILA 2010.

26 ILA 2012b (*Resolution No. 5/2012: Rights of Indigenous Peoples*), para. 2. (For the survey itself see ILA 2010 and 2012a). Likewise, the UN Special Rapporteur has noted that “some aspects of the Declaration — including core principles of non-discrimination, cultural integrity, property, self-determination and related precepts that are articulated in the Declaration — constitute, or are becoming, part of customary international law or are general principles of international law... It cannot be much disputed that at least some of the core provisions of the Declaration, with their grounding in well-established human rights principles... reflect customary international law” (Anaya 2013, para. 64)

27 See the International Law Association’s report on the Accountability of International Organizations (ILA 2004), p. 22; and Reinisch 2005, p. 46 ff.

28 ILA 2012b, para. 3. Similarly, Anaya 2013, paras. 61-63.

29 ILA 2010, pp. 43, 51.

social and cultural development.”<sup>30</sup> The wording of Article 3 mirrors a provision contained in the two international human rights Covenants (ICCPR and ICESCR) which upholds the right to self-determination for “[a]ll peoples”.<sup>31</sup> This underscores the fact that the right to self-determination of indigenous peoples is the same right to self-determination that all peoples enjoy under international law.<sup>32</sup>

In essence, the right to self-determination “provides indigenous peoples with the right to control their own destiny and govern themselves... and embodies their right to live and develop as culturally distinct groups”.<sup>33</sup> The former Chair of the UN Working Group on Indigenous Populations, Erika-Irene Daes has remarked that “[t]he true test of self-determination is not whether Indigenous Peoples have their own institutions of self-determination, legislative authorities, laws, police, or judges,” but rather “whether Indigenous Peoples themselves actually feel they have choices about their way of life” and thus are able “to live well and humanly in their own ways”.<sup>34</sup>

In the context of World Heritage, a crucial element of the right to self-determination is the right of indigenous peoples to manage, for their own benefit, their own natural resources.<sup>35</sup> As the UN Human Rights Committee has emphasized, referring specifically to indigenous peoples, “the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence”.<sup>36</sup> This means, among other things, that the extinguishment of inherent aboriginal rights to lands and resources is incompatible with indigenous peoples’ right to self-determination.<sup>37</sup>

### **Autonomy, self-government and the right to participate in decision-making**

Directly related to indigenous peoples’ exercise of their right to self-determination is their right to autonomy or self-government, affirmed in Article 4 of the UNDRIP as follows: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in

30 The right to self-determination is to be exercised in conformity with relevant rules of international law and the principles of equality and non-discrimination, as the UNDRIP itself makes clear (Art. 46; preamb. para. 17). In particular, it is to be exercised in a way that is compatible with the principle of territorial integrity and political unity of States. It does not include a right for indigenous peoples to unilaterally establish their own State, i.e. a right of secession, except under such circumstances where this right exists for all peoples under general international law. See ILA 2010, pp. 9-10.

31 See identical Art. 1 of the ICCPR and the ICESCR.

32 On this aspect, see Anaya 2013, paras. 74-77; and ILA 2010, pp. 10-11. The treaty bodies that monitor the implementation of the two human rights Covenants have repeatedly invoked Art.1 of the Covenants in relation to indigenous peoples. See Forest Peoples Programme 2013.

33 ILA 2010, p. 10.

34 Daes, E.-I. 2001. The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples. *St. Thomas Law Review* 14, p. 263 f. Quoted in ILA 2010, p. 11.

35 EMRIP 2011, Annex, para. 18.

36 CCPR 1999, para. 8. According to Art. 1, para. 2 of the two human rights Covenants, “[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of its own means of subsistence.” Both the Human Rights Committee and the Committee on Social, Economic and Cultural Rights have repeatedly applied this provision to indigenous peoples.

37 CCPR 1999, para. 8.

matters relating to their internal and local affairs...”<sup>38</sup> The right of indigenous peoples to autonomy or self-government involves, on the one hand, the right to organize their social, economic, cultural and political life through their own laws, customs and practices and to establish, maintain and develop their own legal, political and cultural institutions (Articles 5, 18, 34 UNDRIP). On the other, it involves the right to effectively participate in external decision-making processes that affect them and to be consulted prior to the approval of any project or measure that may impact on their rights, lands or ways of life, with the objective of achieving agreement or consensus (Articles 18, 19, 32 UNDRIP).<sup>39</sup>

The participatory rights of indigenous peoples, and corresponding duties of States, are essential elements of indigenous peoples’ right to self-determination and have been repeatedly affirmed by international human rights courts and treaty bodies. As will be seen in the following chapters of this book, they are crucial in the context of the World Heritage Convention.<sup>40</sup> The UNDRIP recognizes indigenous peoples’ “right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures” (Article 18). At the same time, the Declaration recognizes that States have a duty to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them” (Article 19).<sup>41</sup>

While the modalities of indigenous participation can vary depending on the specific circumstances, it is essential for States to ensure that the participation of indigenous peoples in matters which would affect their rights is *effective*. For participation to be effective, indigenous peoples must actually be able to participate in decision-making processes through their own representative institutions and organizations and must be able to influence the outcomes of these processes. This may require special mechanisms to be created for indigenous participation, and that indigenous peoples are made aware of their existence.<sup>42</sup> Furthermore, for indigenous peoples to be able to make free and informed decisions about a given project, they must be “provided with full and objective information about all aspects of the project that will affect them, including the impact of the project on their lives and environment”, as UN Special Rapporteur James Anaya has noted.<sup>43</sup> Information must be presented in a manner and form understandable to indigenous peoples, and indigenous consent must be sought sufficiently in advance of any authorization or commencement of activities, with due respect for the time requirements of indigenous decision-making processes.<sup>44</sup>

38 The ILA report on the rights of indigenous peoples notes that Art. 4 of the UNDRIP implicitly encompasses a “right to territorial self-government”. Indeed, considering the extent to which the social, economic, cultural and political life of indigenous peoples is connected to their lands and territories, “control over traditional lands is the key feature of indigenous peoples’ autonomy, conceived as an element of self-determination” according to the report (ILA 2010, p. 13).

39 See ILA 2010, pp. 12-16; ILA 2012a, pp. 3-7; and EMRIP 2011, Annex.

40 See EMRIP 2011, p. 24 ff.

41 Similarly, Art. 32(2) with regard to projects affecting indigenous peoples’ lands, territories or resources. Also see paras. 3 and 20 of the outcome document of 2014 World Conference on Indigenous Peoples (UN Doc. A/RES/69/2), where these provisions are reaffirmed.

42 See, e.g., EMRIP 2011, pp. 24-26; Anaya 2009, paras. 36-57; ILA 2010, p. 14.

43 Anaya 2009, para. 53.



Generally, States should enable the full and effective participation of indigenous peoples in all stages of an initiative or project, from design, implementation, monitoring and evaluation to benefit-sharing.<sup>45</sup>

### Cultural rights and identity

The protection of indigenous peoples' cultural identity and cultural rights represents a predominant theme throughout the whole text of the UNDRIP. The Declaration includes a number of provisions affirming the right of indigenous peoples to practise, develop and revitalize their cultural and spiritual traditions and customs and to maintain, control, protect and develop their tangible and intangible cultural heritage, traditional knowledge and traditional cultural expressions (Articles 11, 12, 13, 25, 31 and 34, among others). Other provisions affirm the collective right of indigenous peoples to live in freedom, peace and security as culturally distinct groups (Articles 7, 8, 9, and 33) and the right of indigenous peoples and individuals "not to be subjected to forced assimilation or destruction of their culture" (Article 8). Another key provision in terms of cultural rights and identity is Article 10 of the UNDRIP, affirming the right of indigenous peoples not to be forcibly removed from their lands or territories. Particularly relevant in the context of the World Heritage Convention, this provision "addresses the practice, quite common in the past, of removing indigenous peoples from their territories mainly for economic and development reasons, with tremendous consequences for their physical and cultural survival".<sup>46</sup>

The cultural rights affirmed in the UNDRIP find confirmation in a number of provisions included in international human rights treaties, such as Article 27 of the ICCPR, Article 15 of the ICESCR, or Article 5(e)(vi) of the ICERD.<sup>47</sup> The monitoring bodies of these treaties have on many occasions invoked these provisions in support of rights affirmed in the UNDRIP. In doing so, they have stressed that cultural rights entail the recognition of land rights for indigenous peoples, due to the fundamental importance of indigenous peoples' relationship to their lands, territories and resources for retaining their culture and cultural identity.<sup>48</sup>

Moreover, the ILA recognizes a customary international law norm protecting the right of indigenous peoples to recognition and preservation of their cultural identity. States are bound, according to the ILA, "to recognise, respect, protect and fulfil indigenous peoples' cultural identity (in all its elements, including cultural heritage) and to cooperate with them in good faith – through all

44 On the elements of free, prior and informed consent, see UNDG 2009, p. 30 and EMRIP 2011, Annex.

45 UNDESA 2008, p. 17.

46 ILA 2010, p. 18. Also see UNDRIP Art. 8, paras. 2(b) and 2(c).

47 Other instruments affirming cultural rights recognized in the UNDRIP include ILO Convention No. 169, the 2001 *UNESCO Universal Declaration on Cultural Diversity*, the 2003 *UNESCO Convention on the Safeguarding of Intangible Cultural Heritage* and the 2005 *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.

48 See, e.g., Human Rights Committee, *General Comment No. 23: Article 27 (Rights of Minorities)*; Committee on Economic, Social and Cultural Rights, *General comment No. 21: Right of everyone to take part in cultural life*; and Committee on the Elimination of Racial Discrimination, *General Recommendation 23 on the rights of indigenous peoples*. Also see Gilbert, this volume.

possible means – in order to ensure its preservation and transmission to future generations”.<sup>49</sup> The ILA notes that cultural rights must “be safeguarded in a way that is consistent with the perspectives, needs and expectations of the specific indigenous peoples”, and that “all the prerogatives that are essential to preserve the cultural identity of indigenous peoples *according to their own perspective* must be preserved, including, e.g., the right to use ancestral lands and natural resources according to their own tradition”.<sup>50</sup>

## Land rights

As the UN Permanent Forum on Indigenous Issues has observed, lands, territories and natural resources “are of fundamental importance to indigenous peoples since they constitute the basis of their life, existence and economic livelihood, and are the sources of their spiritual, cultural and social identity”. Therefore, “[l]and rights, access to land and control over it and its resources are central to indigenous peoples throughout the world, and they depend on such rights and access for their material and cultural survival.”<sup>51</sup>

Accordingly, the UNDRIP articles on lands, territories and resources are among the most important provisions in the Declaration. The central provision in the UNDRIP dealing with land rights is Article 26, which affirms the right of indigenous peoples “to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired” (paragraph 2), as well as their general right to the lands, territories and resources which they have traditionally owned, occupied or used but no longer possess (paragraph 1). Article 28 provides that indigenous peoples have a right to redress for lands, territories and resources taken from them without their consent in the past.<sup>52</sup>

Other articles in the Declaration recognize related rights, such as the right of indigenous peoples not to be forcibly removed from their lands or territories (Article 10); their right to maintain and strengthen their spiritual relationship with their traditional lands, territories and resources (Article 25); their right to determine and develop priorities and strategies for the development or use of their lands and resources (Article 32); their right to the conservation and protection of the environment and the productive capacity of their lands and resources (Article 29); their right to be secure in the enjoyment of their own means of subsistence (Article 20); their right to the protection of their traditional medicinal plants and animals (Article 24); and their right to maintain and develop their traditional knowledge and cultural heritage associated with their lands and territories (Article 31).

The land and resource rights of indigenous peoples have been repeatedly recognized and affirmed by international human rights courts and treaty bodies, including the Human Rights

49 ILA 2012b, para. 6. Also see ILA 2010, pp. 16-20; 2012a, pp. 16-23.

50 ILA 2012b, para. 6; and 2010, p. 51.

51 UNPFII 2007, paras. 4 and 6.

52 Additionally, Art. 27 requires States to establish and implement processes to recognize and adjudicate the rights of indigenous peoples to their lands, territories and resources, including those that were traditionally owned, occupied or used.

Committee, the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights. From the practice and jurisprudence of these bodies, it is clear that indigenous peoples' collective rights to their traditional lands, territories and resources are protected by international treaty law in connection with a variety of other rights, including the right to property, the right to cultural integrity, the right to self-determination and the general prohibition of racial discrimination.<sup>53</sup> Moreover, "[r]espect for the rights of indigenous peoples to ownership of, control over and access to their traditional lands and natural resources is a precondition for the enjoyment of other rights such as the rights to food, health, adequate housing, culture and free exercise of religion", as the former UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, has remarked.<sup>54</sup>

According to the ILA, "States must comply – pursuant to customary and applicable conventional international law – with the obligation to recognise, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources, which include the right to restitution of the ancestral lands, territories and resources of which they have been deprived in the past." The ILA underlines that "Indigenous peoples' land rights must be secured in order to preserve the spiritual relationship of the community concerned with its ancestral lands, which is an essential prerequisite to allow such a community to retain its cultural identity, practices, customs and institutions."<sup>55</sup> The relevant norms of customary international law also imply that indigenous peoples "must be allowed to manage their lands autonomously and according to their customary rules; this prerogative is strictly connected with the rights to self-determination and autonomy or self-government".<sup>56</sup>

### **Reparation, redress and remedies**

A number of provisions in the UNDRIP affirm the rights of indigenous peoples to reparation and redress for human rights breaches they have suffered, including Articles 8(2), 11(2), 12(2), 20(2), 28, 32(3) and 40. Especially relevant in the context of World Heritage sites are Article 20(2), affirming that "Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress", and Article 28, affirming that

"Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."

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53 See Feiring 2013 and Gilbert, this volume.

54 Stavenhagen 2007, para. 43.

55 ILA 2012b, para. 7.

56 ILA 2010, p. 51.

Also important in the context of the World Heritage Convention is Article 32(3) of the UNDRIP, which requires States to provide effective mechanisms for just and fair redress for any project or activities affecting the lands, territories or resources of indigenous peoples, and to take appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impacts arising from such activities.

As shown by the ILA, States have obligations under both treaty law and customary international law to recognize and fulfil the rights of indigenous peoples to reparation and redress for wrongs they have suffered.<sup>57</sup> With regard to dispossession of indigenous peoples' ancestral lands, the kind of reparation that is generally preferable is the restitution of the lands, territories and resources concerned. The reason for this is "that in most cases no form of compensation is adequate to recompense effectively the deep spiritual significance that the motherland has for the very cultural identity and – in many cases – even the physical existence of indigenous communities." Consequently, "restitution is the form of redress to be granted any time that it is actually practicable."<sup>58</sup> In line with this, the Committee on the Elimination of Racial Discrimination has called on States parties to the ICERD:

"to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories."<sup>59</sup>

## Obligations and commitments of UNESCO

Promotion of respect for human rights is one of the fundamental objectives of the United Nations system as a whole. As stated in Article 1(3) of the UN Charter, one of the main purposes of the United Nations is "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." This commitment has been reaffirmed by the UN General Assembly, other UN organs and the individual Member States in countless declarations, conventions and other instruments. It is also reflected in Article 1 of UNESCO's Constitution, which establishes the furthering of universal respect for human rights as one of the fundamental purposes of the organization. An obligation and responsibility of UNESCO to protect and promote human rights, and in particular the rights of indigenous peoples, is also

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57 ILA 2010, p. 39 ff; ILA 2012b, para. 10.

58 ILA 2010, p. 41.

59 CERD 1997, para. 5 (*General Recommendation 23 on the rights of indigenous peoples*).

implicit in the organization's expressed commitment to principles and values such as cultural diversity, sustainable development and good governance.<sup>60</sup>

Moreover, the UNESCO General Conference has repeatedly emphasized that UNESCO will incorporate a human rights-based approach into all its programs and activities.<sup>61</sup> This means in practice that "all activities should contribute to the realization of human rights" and that "human rights principles and standards should guide the programming process in all fields and all stages, including design, implementation, monitoring and evaluation", as the *UNESCO Strategy on Human Rights* notes.<sup>62</sup> Programmes and activities should be conceived and designed to "contribute to the development of the capacities of 'duty-bearers' to meet their obligations and of 'rights-holders' to claim their rights".<sup>63</sup>

As a Declaration of the UN General Assembly, the UNDRIP represents a solemn and high-level commitment on the part of the United Nations to its provisions, within the framework of the obligations established by the UN Charter to promote and protect human rights on a non-discriminatory basis.<sup>64</sup> This commitment is explicit in Articles 41 and 42 of the Declaration, which require UN organs and specialized agencies to promote and act in accordance with the standards expressed in the Declaration. According to Article 41, the organs and specialized agencies of the United Nations system, as well as other intergovernmental organizations, shall establish ways and means of ensuring the participation of indigenous peoples on issues affecting them and "shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance". Article 42 calls on the United Nations, its bodies and specialized agencies to "promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration", including in their action at the country level.

When the UNDRIP was adopted, UNESCO's then Director-General, Koïchiro Matsuura, officially welcomed it as "a milestone for indigenous peoples and all those who are committed to the protection and promotion of cultural diversity and intercultural dialogue", promising that the

60 See, e.g., UNESCO 2008, paras. 2, 3; UNESCO 2013c, para. 112. See, e.g., *UNESCO Universal Declaration on Cultural Diversity*, Art. 4: "The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples..."; *Plan of Implementation of the World Summit on Sustainable Development*, 2002, para. 5: "respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity, are essential for achieving sustainable development and ensuring that sustainable development benefits all"; *The future we want* (Outcome document, United Nations Conference on Sustainable Development, 2012), para. 49: "We stress the importance of the participation of indigenous peoples in the achievement of sustainable development. We also recognize the importance of the United Nations Declaration on the Rights of Indigenous Peoples in the context of global, regional, national and subnational implementation of sustainable development strategies". On the mutually reinforcing relationship between good governance and human rights, see e.g. Human Rights Council Resolution 7/11 (2008), "The role of good governance in the promotion and protection of human rights" and the *United Nations Millennium Declaration*, Sec. V.

61 UNESCO 2003; UNESCO 2008, paras. 6, 69; UNESCO 2013c, para. 91.

62 UNESCO 2003, pp. 2 and 5.

63 *Ibid.*, p. 5. The UNESCO Strategy on Human Rights reflects the "UN Common Understanding on the Human Rights-Based Approach to Development Cooperation". See OHCHR 2006, Annex II.

64 Anaya 2008, para. 41.

UNDRIP would “undoubtedly provide the foremost reference point [for UNESCO] in designing and implementing programmes with and for indigenous peoples”.<sup>65</sup> On another occasion, the 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’. By approving this landmark Declaration, the UN has taken a major step forward in the protection and promotion of indigenous peoples’ rights... and has sent a clear signal in this regard to the international community. It is now the responsibility of the United Nations, and in particular UNESCO..., to ensure that this message is widely disseminated, understood and – most importantly – translated into concrete policies that will enable indigenous peoples to participate fully and equally in the national and international life.

Indeed, the new Declaration echoes the principles of the UNESCO Universal Declaration on Cultural Diversity (2001) 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.”<sup>66</sup>

UNESCO’s commitment to the UNDRIP was renewed by the General Conference in the Organization’s *Medium-Term Strategy 2014-2021*, where it is declared that:

“The needs of indigenous peoples will also be addressed by UNESCO’s action. They continue to be disproportionately represented among the most marginalized and impoverished segments of society, while being recognized as the stewards of the major part of the world’s biological, cultural and linguistic diversity... [T]he Organization will implement the UNDRIP across all relevant programme areas.”<sup>67</sup>

Already in 2011, UNESCO embarked on a process of developing a house-wide Policy on Indigenous Peoples, which “will aim at positioning appropriately the Organization’s programmes, procedures and activities with respect to the new institutional landscape that is emerging since the adoption of the UNDRIP, and building awareness and providing guidance to staff and committees in order to effectively implement the UNDRIP in all components of UNESCO’s work.”<sup>68</sup>

However, UNESCO has noted that implementing the UNDRIP in all components of the organization’s work presents a challenge due to the fact that there are “two layers of intergovernmental governance within UNESCO on certain issues”. While the main decision-making

65 Matsuura 2007.

66 Matsuura 2008.

67 UNESCO 2013c, para. 20.

68 UNESCO 2014a, p. 3. As of February 2014, drafting of the Policy was still in its early stages (ibid.).

bodies of UNESCO are the General Conference of Member States and the Executive Board (a smaller elected group of 58 Member States), some UNESCO Conventions and programmes have their own independent intergovernmental governance structures. Although “in many cases the same member states are sitting on these different bodies, they take decisions independently and sometimes these decisions are contradictory”, according to UNESCO. “Thus, the effort of ensuring that indigenous issues are accurately reflected in all programmes, conventions and activities house-wide is complex, involving different semi-autonomous bodies.”<sup>69</sup>

This challenge is clear in relation to the World Heritage Convention, a self-standing multilateral treaty with its own States Parties and a separate intergovernmental governance structure.<sup>70</sup> As further discussed below, the implementation of the Convention falls far short of the principles and requirements of the UNDRIP and there is a long history of human rights violations against indigenous peoples in relation to World Heritage sites. There can be no doubt, however, that the obligations of UNESCO to protect and promote the rights of indigenous peoples, both under its Constitution and under the UNDRIP, fully apply to the World Heritage Convention and its governing bodies. The Convention was adopted by UNESCO’s General Conference pursuant to its functions under the UNESCO Constitution, and the Convention explicitly states that its central decision-making body, the World Heritage Committee, is “established within UNESCO” (Article 8.1). The Convention’s Secretariat, the World Heritage Centre, is under the authority of UNESCO’s Director-General, who appoints its staff pursuant to Article 14 of the Convention. It is located within UNESCO and is not autonomous of the organization.<sup>71</sup> Moreover, the Convention’s membership is today almost identical to that of UNESCO and, with only one exception, all States Parties to the Convention are also Members of UNESCO.<sup>72</sup>

## Implementation of the World Heritage Convention

The main purpose of the World Heritage Convention, which embodies the idea that some places are so special and important that their protection is not only the responsibility of the States in which they are located but also a duty of the international community as a whole, is the identification and collective protection of cultural and natural heritage sites of “outstanding universal value” (OUV). While no definition of this elusive term is provided in the Convention, the World Heritage Committee has adopted the following definition, contained in the *Operational Guidelines for the Implementation of the World Heritage Convention*: “Outstanding Universal Value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity.”<sup>73</sup>

69 UNESCO 2014a, p. 2.

70 On the relationship between the World Heritage Committee and UNESCO see Vrdoljak 2008a, p. 224 f.

71 See Vrdoljak 2008b, p. 248 f.

72 As of 15 August 2014, there were 192 States Parties to the World Heritage Convention compared to 195 Member States of UNESCO. The only State Party that is not a UNESCO Member is the Holy See.

73 *Operational Guidelines*, para. 49. The Operational Guidelines have been regularly revised throughout the history of the Convention. Unless otherwise noted, references in this chapter refer to the July 2013 version.

The World Heritage Committee has also developed a set of ten specific criteria (six relating to cultural and four to natural values), at least one of which a given site must meet in order to be considered of OUV for the purposes of the Convention.<sup>74</sup> Additionally, to be deemed of OUV, a site must meet the conditions of integrity<sup>75</sup> and authenticity<sup>76</sup> (the latter only in the case of cultural sites), and must have an adequate protection and management system to ensure its safeguarding.<sup>77</sup> If these requirements are met, the site qualifies for inscription on UNESCO's World Heritage List, i.e. for designation as a cultural, natural or "mixed" (cultural and natural) World Heritage site (see Figure 1).<sup>78</sup> While the decision to include sites on the World Heritage List is the prerogative of the World Heritage Committee, sites can only be listed following a formal nomination by the State Party in whose territory they are located, and after having been included on the respective State Party's so-called 'Tentative List' (of potential World Heritage sites) for at least one year.<sup>79</sup> All nominated sites are visited and evaluated by the World Heritage Committee's advisory bodies IUCN and/or ICOMOS<sup>80</sup> before the Committee decides whether or not they will be inscribed on the World Heritage List. The Committee can also *refer* a nomination back to the State Party for additional information or *defer* a nomination for more in-depth assessment or study, or a substantial revision by the State Party.<sup>81</sup>

Once listed, a World Heritage site must be managed and protected with a view to maintaining its OUV as recognized by the World Heritage Committee. This is the responsibility of the State Party (or States Parties in the case of transboundary/transnational sites) in whose territory the site is located. States Parties have an obligation to regularly prepare reports about the state of conservation of the World Heritage sites in their territories and the protection measures put in place to ensure their safeguarding ("Periodic Reporting").<sup>82</sup> Additionally, the World Heritage Committee's advisory bodies and the World Heritage Centre report to the Committee on the state of conservation of specific World Heritage sites that are considered to be under threat ("Reactive Monitoring"). In this context, they can collect and make use of information received from sources other than the States Parties concerned, including information received from indigenous peoples

74 Contained in *ibid.*, para. 77. The ten criteria have been occasionally revised by the Committee to reflect the evolution of the World Heritage concept. Now numbered (i) through (x), they were labeled cultural criteria (i)-(vi) and natural criteria (i)-(iv) until 2004.

75 See *ibid.*, paras. 78, 87-95. Integrity is a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes.

76 See *ibid.*, paras. 78-86. In essence, a cultural heritage site meets the condition of authenticity if it is 'genuine' (i.e. if it is truly what it claims to be) and if the information sources about its heritage values may be understood as credible or truthful. See Jokilehto 1999, p. 11 f.

77 For details, see *Operational Guidelines*, paras. 78, 96-119.

78 See *ibid.*, paras. 45-47. A sub-category of cultural World Heritage sites are cultural landscapes, which represent the "combined works of nature and of man" mentioned in Article 1 of the World Heritage Convention. The cultural landscapes category was introduced by the World Heritage Committee in 1992. See Annex 3 of the *Operational Guidelines*.

79 *Operational Guidelines*, paras. 24(a), 63 and 65.

80 The World Heritage Committee is supported by three 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). On the roles of the advisory bodies, see *Operational Guidelines*, paras. 30-37 and the chapter by Larsen, Oviedo and Badman in this volume

81 *Operational Guidelines*, Chapter III.G.

82 See *Operational Guidelines*, para. 15 and Chapter V.



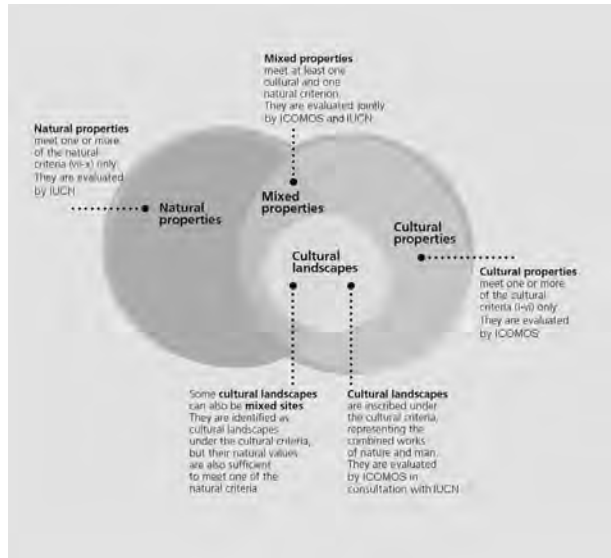


Figure 1: Types of World Heritage sites ('properties'). Adapted from UNESCO et al. 2011

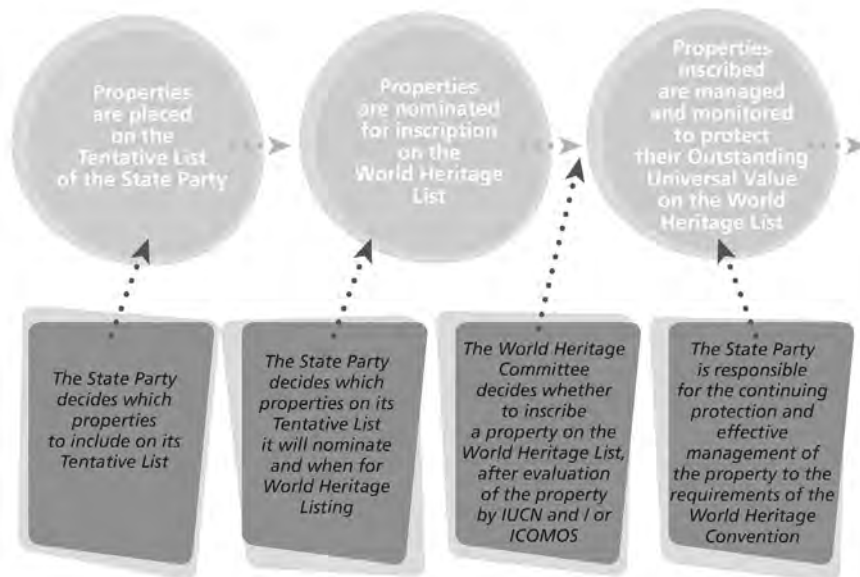


Figure 2: Summary of the different steps in the nomination process and the main responsibilities of the State Party and the UNESCO World Heritage Committee. Source: UNESCO et al. 2011

or non-governmental organizations, and may make recommendations on how to mitigate threats and outline corrective measures.<sup>83</sup>

## Lack of implementation of the UN Declaration on the Rights of Indigenous Peoples in the context of the World Heritage Convention

The World Heritage Convention can play, and in some cases undoubtedly has played, a positive role for indigenous peoples by helping them protect their lands and territories, cultures and heritage from development pressures such as urban encroachment or extractive industry activities. A recent example is the incorporation of the uranium-rich Koongarra area into the Kakadu National Park World Heritage site, at the joint request of the State Party and the indigenous landowners, in effect barring future mineral development in the area.<sup>84</sup> 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. Further, in monitoring the state of conservation of inscribed World Heritage sites, the World Heritage Committee and/or its advisory bodies, IUCN and ICOMOS, may call on States Parties to improve indigenous peoples' participation in the management and decision-making processes of particular sites or to enhance benefit-sharing mechanisms.<sup>85</sup> These interventions have become more frequent in recent years and have in some cases contributed to positive change for indigenous peoples.<sup>86</sup>

However, throughout the history of the World Heritage Convention there have been frequent objections raised by indigenous peoples regarding violations of their rights in the implementation of the Convention, not only at the domestic 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 advisory bodies IUCN and ICOMOS, and its Secretariat. Human rights concerns include, *inter alia*, frequent disrespect for indigenous peoples' participatory rights in the nomination and inscription of sites, marginalization of indigenous peoples in the on-site decision-making and management of World Heritage areas, violations of their right to share equitably in tourism benefits, a common lack of consultation with indigenous peoples by monitoring and site evaluation missions and a serious lack of transparency in some of the Convention's processes. Moreover, in some World

83 *Operational Guidelines*, Chapter IV.A.

84 See O'Brien, this volume.

85 See, for example, World Heritage Committee Decisions 37 COM 7B.30, para. 8b (Talamanca Range-La Amistad Reserves / La Amistad National Park, Costa Rica / Panama); 34 COM 7B.4, para. 6 (Ngorongoro Conservation Area, United Republic of Tanzania); or 35 COM 7B.34, para. 4d (Manu National Park, Peru).

86 For instance, the World Heritage Committee, IUCN and the World Heritage Centre in 2014 urged the Government of Kenya to ensure full and effective participation of the indigenous Endorois in the management and decision-making of Lake Bogoria National Reserve (see UNESCO 2014b, p. 111-113 and Committee Decision 38 COM 7B.91). This appears to have facilitated the signing of a Memorandum of Understanding in May 2014 between Kenyan government agencies and representatives of the Endorois which notes that the involvement of the Endorois in the management of the Reserve is paramount, sets out a framework for the co-management of the Reserve by Kenyan government agencies and the Endorois and recognizes that any decision-making concerning the Endorois people must have their free, prior and informed consent (for details on this case, see Sing'Oei, this volume).



*The World Heritage Committee at its 35th Session in Paris in June 2011, following the decision to incorporate the Koongarra area into the Kakadu World Heritage site in Australia. In the center front row Jeffrey Lee, the senior traditional owner of the Koongarra area. Photo: Stefan Disko*

Heritage areas indigenous peoples are essentially treated as threats to their own territories and tight restrictions and prohibitions are placed on traditional land-use practices such as hunting, gathering, farming or animal husbandry, in violation of indigenous peoples' cultural and subsistence rights. These restrictions and prohibitions have had severe consequences for some indigenous peoples' food security, health and well-being and can in some cases be directly linked to the World Heritage status.<sup>87</sup> The World Heritage List also contains several protected areas from which indigenous peoples have been forcibly removed,<sup>88</sup> in some instances even with the intention of "justifying inscription of an area on the World Heritage List as a place of natural importance devoid of what is perceived as the negative impact of local inhabitants", as a former staff member of the World Heritage Centre has

87 See, for instance, the case of the Ngorongoro Conservation Area, where a ban on subsistence cultivation imposed in 2009 resulted in a serious situation of hunger and malnutrition that affected most of the area's 70,000 residents and led to the deaths of several people (Olenasha, this volume).

88 For some examples, see the articles in this volume by Kidd (Bwindi Impenetrable National Park), Muchuba (Kahuzi-Biega National Park), Buergin (Thungyai - Huai Kha Khaeng Wildlife Sanctuaries), Sing'Oei (Lake Bogoria National Reserve) and Olenasha (Serengeti National Park).

remarked.<sup>89</sup> This legacy remains completely unaddressed by the World Heritage Committee although many of the affected indigenous peoples continue to suffer from the consequences to this day.

The violation of indigenous rights in World Heritage sites and in the implementation of the World Heritage Convention is facilitated by the fact that “the World Heritage Convention does not give any recognition to indigenous peoples’ rights over cultural and natural heritage”, as noted in the ILA’s study on the rights of indigenous peoples.<sup>90</sup> Rather, “the Convention entrusts territorial States with all responsibilities concerning proposals for inscription of cultural and natural properties on the World Heritage List... and relating to the management of such properties after their inscription”.<sup>91</sup> While the lack of recognition of indigenous peoples’ rights in the text of the Convention can be explained by its early adoption, in 1972, when international law in this area was little developed, the subsequently devised and frequently updated *Operational Guidelines*, also, do not contain any provisions on the rights of indigenous peoples, nor other references to human rights. The ILA study therefore concludes that “the consideration devoted to indigenous peoples’ rights in the context of the operation of the World Heritage Convention is far from being adequate”.<sup>92</sup>

To its credit, in 2007 the World Heritage Committee adopted a “Strategic Objective” to “Enhance the role of communities in the implementation of the *World Heritage Convention*”, in recognition of “the critical importance of involving indigenous, traditional and local communities in the implementation of the *Convention*”.<sup>93</sup> In a 2011 Decision, the Committee also encouraged States Parties to “[i]nvolve indigenous peoples and local communities in decision making, monitoring and evaluation of the state of conservation of [World Heritage sites]” and to “[r]espect the rights of indigenous peoples when nominating, managing and reporting on World Heritage sites in indigenous peoples’ territories”.<sup>94</sup> However, the Convention’s *Operational Guidelines* continue to be entirely inadequate for ensuring the meaningful participation of indigenous peoples and respect for their rights in Convention processes. Rather than upholding the right of indigenous peoples to effectively participate in decision-making affecting them, the *Operational Guidelines* merely “encourage” States Parties to ensure the participation of “a wide variety of stakeholders” in the processes of the Convention:

“States Parties to the *Convention* are encouraged 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.”<sup>95</sup>

89 Titchen 2002.

90 ILA 2012a, p. 17.

91 *Ibid.*

92 *Ibid.*

93 See World Heritage Committee Decisions 31 COM 13A and 31 COM 13B. This fifth strategic objective, also known as the “fifth C”, was adopted by the World Heritage Committee during the Chairmanship of Sir Tumu Te Heuheu, Paramount Chief of Ngāti Tūwharetoa, the first indigenous person to hold this position (representing New Zealand).

94 Decision 35 COM 12E, para. 15.

95 Para. 12. Other provisions on the involvement of local communities and other stakeholders include paras. 40, 64, 123 and 211. The only provision that is couched in slightly more obligatory language relates to nominations of cultural landscapes to the World Heritage List, which “should be prepared in collaboration with and the full approval of local communities” (Annex 3, para. 12).

This approach, which subsumes indigenous peoples into a wider category of stakeholders such as local communities, NGOs and other interested parties, negates indigenous peoples' status and rights under international law, including their right to self-determination and their collective rights to their lands, territories and resources. In accordance with the principles of the UNDRIP, indigenous peoples must be treated as rights-holders and key decision-makers whose consent has to be sought in the case of activities affecting their rights, and not merely lumped together with a wide variety of 'stakeholders', who may or may not be included in decision-making processes.

The first concerted effort of indigenous peoples to enhance the consideration given to their rights in the implementation of the World Heritage Convention was in 2000 during the 24<sup>th</sup> session of the World Heritage Committee in Cairns, Australia. A forum of indigenous peoples held in conjunction with that session called for the establishment of a "World Heritage Indigenous Peoples Council of Experts (WHIPCOE)" as a consultative body to the Committee out of concern about 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".<sup>96</sup> The forum proposed that WHIPCOE should complement the work of the Committee's existing advisory bodies and provide "expert Indigenous advice on the holistic knowledge, traditions and cultural values of Indigenous Peoples relative to the implementation of the World Heritage Convention, including current operational guidelines".<sup>97</sup> Among other things, it was thought that a body such as WHIPCOE was needed "to advise on 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".<sup>98</sup>

However, although the proposal was considered by the World Heritage Committee at its 24<sup>th</sup> and 25<sup>th</sup> sessions, the Committee did not approve the establishment of WHIPCOE as a consultative body or network reporting to it. The stated reasons for this decision included "a number of legal concerns and issues relating to the funding, legal status, role and relationships (with the States Parties, Advisory Bodies, World Heritage Committee and World Heritage Centre)" and the fact that "[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."<sup>99</sup> The former Chairperson of the World Commission on Protected Areas, Adrian Phillips, attributed the decision to a "dismissive attitude towards indigenous peoples' issues" among some of the Committee members.<sup>100</sup>

In 2002, Mirarr senior traditional owner Yvonne Margarula from the Kakadu National Park World Heritage area in Australia submitted a statement on behalf of the Mirarr people to the inaugural session of the UN Permanent Forum on Indigenous Issues which recommended that the Permanent Forum undertake an independent study of indigenous peoples and World Heritage. The statement suggested that the study analyze the effectiveness of the World Heritage Convention in the protection

96 UNESCO 2001, p. 2.

97 Ibid., p. 3.

98 Ibid., p. 5.

99 UNESCO 2002, p. 57.

100 Quoted in IUCN 2002, p. 15.

of indigenous peoples' sacred sites and living traditions; the potential impact of the World Heritage Committee's then ongoing review of its *Operational Guidelines* on indigenous peoples living in World Heritage areas; and indigenous peoples' representation and input into the World Heritage Committee's decision-making processes.<sup>101</sup> Following the Permanent Forum's first session, indigenous peoples raised concerns on many occasions with the Forum about violations of their rights in World Heritage sites and in the implementation of the Convention. Having a mandate to provide expert advice and recommendations on indigenous issues to programmes and agencies of the United Nations, and to promote respect for the UNDRIP and follow up its effectiveness,<sup>102</sup> in 2010 the Permanent Forum for the first time sent a representative to a session of the World Heritage Committee. The purpose of this participation was to inform the Committee about the numerous concerns related to World Heritage sites that indigenous organizations had brought to the Forum's attention since its first session in 2002. In a written submission to the Committee, the Forum highlighted, among other things, that it had received complaints about a "list of indigenous sites inscribed in the World Heritage List without the adequate participation and involvement of indigenous peoples".<sup>103</sup>

In 2011, a broad coalition of indigenous organizations and NGOs submitted a joint statement to the World Heritage Committee, as well as the Permanent Forum, expressing "serious concern about the continuous and ongoing disrespect of the principle of free, prior and informed consent by UNESCO's World Heritage Committee when it designates sites in Indigenous peoples' territories as 'World Heritage sites'". The joint statement noted:

"There are numerous examples of Indigenous sites on the World Heritage List that have been inscribed without the free, prior and informed consent of the Indigenous peoples concerned. In many cases Indigenous peoples were not even consulted when their territories were designated as World Heritage sites, although this designation can have far-reaching consequences for their lives and human rights, their ability to carry out their subsistence activities, and their ability to freely pursue their economic, social and cultural development in accordance with their right of self-determination."<sup>104</sup>

The joint statement also denounced the fact that three World Heritage nominations under consideration by the Committee at the time (Western Ghats, Sangha Trinational and Kenya Lake System in the Great Rift Valley) had been prepared without the meaningful involvement or consultation of affected indigenous peoples and that insufficient consideration had been given to indigenous peoples' cultural values and their role as stewards of the respective places. It urged

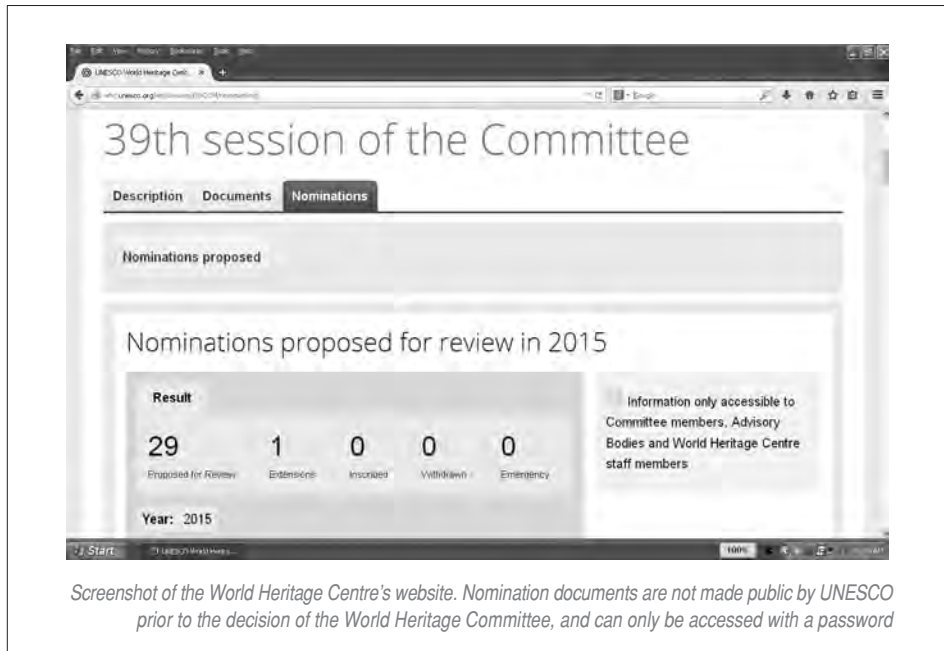
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101 Mirarr People 2002.

102 See UN ECOSOC Resolution E/2000/22, para. 2; and UNDRIP, Art. 42.

103 UNPFII 2010b.

104 Endorois Welfare Council et al. 2011. The statement also expresses concern, in response to the 2010 designation of the Ngorongoro Conservation Area as a cultural World Heritage site (in recognition of archaeological but not indigenous cultural values), "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." For more detail on the case in point, see Olenasha, this volume.



the Committee not to approve these nominations until the indigenous peoples concerned had been adequately consulted and involved and their free, prior and informed consent obtained.

The objections expressed in the joint statement did not, however, receive any noteworthy consideration by the World Heritage Committee. Kenya Lake System was inscribed on the World Heritage List in 2011, while Western Ghats and the Sangha Trinational were inscribed in 2012 despite the concerns not having been resolved in any of the three cases.<sup>105</sup> In the latter two instances, the indigenous peoples concerned had not even been able to review the final versions of the nomination documents, which had not been made publicly available by the relevant States Parties or UNESCO before the World Heritage Committee took its decision.<sup>106</sup>

The fact that there is no requirement under the *Operational Guidelines* for World Heritage nominations and other key documents such as state of conservation reports and monitoring mission reports to be made publicly available before the World Heritage Committee takes a decision is of serious concern to indigenous peoples.<sup>107</sup> It has in many cases prevented

<sup>105</sup> For more detail, see the articles in this volume by Sing'Oei Abraham; Bijoy; and Amougou-Amougou and Woodburne.

<sup>106</sup> IWGIA et al. 2012.

<sup>107</sup> While nomination documents are never disclosed by UNESCO before a site is inscribed (see screenshot of UNESCO website), in 2013 and 2014 the World Heritage Committee encouraged States Parties to authorize UNESCO to make reports relating to the state of conservation of their World Heritage sites publicly accessible in order to contribute to improved transparency in the reactive monitoring process (see Decisions 37 COM 7C and 38 COM 7). Although most reports are now published, this is not a requirement and some reports by State Parties, as well as some of the monitoring mission reports, continue to be withheld from the public, in particular those of a contentious character.

indigenous peoples from reviewing such documents and providing their perspectives to the Committee, despite the fact that the proposals contained in these documents may have far-reaching implications for their rights and interests.<sup>108</sup> This remarkable lack of transparency in the processing of World Heritage nominations, as well as other processes of the World Heritage Convention, has been strongly criticized by indigenous organizations as inconsistent with the right of indigenous peoples to participate in decision-making affecting them, as well as with sustainable development principles and State obligations to ensure public participation in environmental decision-making.<sup>109</sup>

## Response of human rights bodies

International and regional human rights bodies have, on countless occasions, expressed concerns about the impacts of the establishment and management of specific conservation areas on indigenous peoples and their ability to pursue traditional ways of life. They have underlined, among other things, that conservation areas established in the ancestral territories of indigenous peoples must allow for sustainable economic and social development that is compatible with the cultural characteristics and living conditions of the indigenous peoples concerned, that the management of such areas must ensure the effective participation of indigenous peoples in decisions affecting them, and that redress must be provided for disposessions and land alienation suffered by indigenous peoples as a result of the establishment of such areas.<sup>110</sup> There are also numerous cases in which human rights bodies have expressed concern over violations of indigenous rights in conservation areas that were recognized as World Heritage sites or included on States Parties' tentative lists of potential World Heritage sites, and have urged the respective States Parties to address these concerns.<sup>111</sup>

<sup>108</sup> Until the mid-1990s, the *Operational Guidelines* even promoted non-transparent and non-participatory nomination processes, requiring that: "In all cases, so as to maintain the objectivity of the evaluation process and to avoid possible embarrassment to those concerned, States Parties should refrain from giving undue publicity to the fact that a property has been nominated for inscription pending the final decision of the Committee on the nomination in question" (former para. 14). While this provision was deleted in 1996, similar thinking continues to be contained in Annex 6 of the *Guidelines* (Procedures of ICOMOS for the evaluation of cultural sites), where States Parties "are requested to ensure that ICOMOS evaluation missions are given a low profile so far as the media are concerned... [P]remature publicity can cause embarrassment both to ICOMOS and to the World Heritage Committee."

<sup>109</sup> See *The future we want*, para. 43 (Outcome document of the 2012 UN Conference on Sustainable Development) and the 1998 *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.

<sup>110</sup> See, e.g., CERD 2004, para. 13; CERD 2007, para. 22; CERD 2008, para. 19; CDESCR. 2012, paras. 22, 29; or ACHPR 2009.

<sup>111</sup> See, e.g., CERD 2012 (Kaeng Krachan National Park, Thailand); CCPR 2012, para. 24, CERD 2011, para. 17; and ACHPR 2011 (Kenya Lake System, Kenya); ACHPR 2000, pp. 12-16 (Bwindi Impenetrable National Park, Uganda; Kahuzi-Biega National Park, DRC; Dja Faunal Reserve, Cameroon; Ngorongoro Conservation Area, Tanzania; among other sites); Kothari 2008, para. 104 (Chitwan National Park, Nepal); Anaya 2012a, para. 13 and 2012c, para. 50 (Quebrada de Humahuaca, Argentina).



In recent years, due to the many concerns raised by indigenous peoples in relation to World Heritage sites around the world, several international human rights bodies and mandate-holders have drawn attention to systemic shortcomings in the implementation of the World Heritage Convention and called on the World Heritage Committee, UNESCO and the Advisory Bodies to take corrective action. Back in 2005, before the adoption of the UNDRIP, the UN General Assembly had already made the following recommendation to UNESCO, contained in the *Programme of Action for the Second International Decade of the World's Indigenous People*:

“UNESCO is urged to establish mechanisms to enable indigenous peoples to participate effectively in its work relating to them, such as the... nomination of indigenous sites in the World Heritage List and other programmes relevant to indigenous peoples.”<sup>112</sup>

Since the General Assembly's adoption of the UNDRIP in 2007, all three of the UN mechanisms with specific mandates concerning the rights of indigenous peoples (UNPFII, EMRIP and Special Rapporteur) have urged the World Heritage Committee to bring the implementation of the World Heritage Convention into line with the requirements of the UNDRIP, and to adopt changes to the existing procedures and Operational Guidelines to that end. In his 2012 report to the General Assembly, Special Rapporteur James Anaya highlighted that:

“... there is still no specific policy or procedure which ensures that indigenous peoples can participate in the nomination and management of these sites [World Heritage sites within or near their traditional territories, or otherwise affecting them]. The Operational Guidelines for Implementation of the World Heritage Convention, which set out the procedure for the inscription of properties on the World Heritage list and the protection and conservation of sites, are silent on the issue of participation by indigenous peoples. The guidelines provide only that States parties to the Convention are encouraged to ensure the participation of a wide variety of stakeholders in the identification, nomination and protection of World Heritage properties.”<sup>113</sup>

In 2013 the Special Rapporteur sent a letter to the World Heritage Committee drawing attention to a number of concerns raised by indigenous peoples regarding respect for their rights and worldviews in the nomination and management of World Heritage sites and the overall implementation of the Convention. He encouraged the Committee to undertake a review of its procedures and consider reforms to address these concerns, “emphasiz[ing]

112 UNGA 2005, para. 16.

113 Anaya 2012b, para. 35. With regard to the nomination of sites, the Special Rapporteur further criticized the fact that “States are not specifically required to provide any information on the indigenous peoples and local communities living in or around a site they nominate for World Heritage designation, or review the kind of impact a site might have on the rights of these groups” and that States are not required to “provide information about whether affected peoples have been asked about and agree with the nomination” (ibid. para. 36).

the importance of consulting with indigenous peoples throughout the entirety of such a review process".<sup>114</sup>

The UN Expert Mechanism on the Rights of Indigenous Peoples, a subsidiary body of the Human Rights Council, has offered the following advice to the World Heritage Committee, drawing attention to Articles 41 and 42 of the UNDRIP:

"... UNESCO must enable and ensure effective representation and participation of indigenous peoples in decision-making related to the World Heritage Convention... [R]obust procedures and mechanisms should be established to ensure that indigenous peoples are adequately consulted and involved in the management and protection of World Heritage sites, and that their free, prior and informed consent is obtained when their territories are being nominated and inscribed as World Heritage sites..."

[The Expert Mechanism] Encourages 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 United Nations Declaration on the Rights of Indigenous Peoples and that indigenous peoples can effectively participate in the World Heritage Convention's decision-making processes."<sup>115</sup>

Similarly, the UN Permanent Forum on Indigenous Issues has encouraged the World Heritage Committee to revise the Convention's procedures and *Operational Guidelines* in order to ensure that the rights of indigenous peoples are respected and that their livelihoods and their tangible and intangible heritage are protected in World Heritage areas. The Permanent Forum has expressed its availability to assist in the review and revision of the *Operational Guidelines* and has also recommended that UNESCO invite indigenous representatives and experts to contribute to these efforts.<sup>116</sup> Additionally, the Permanent Forum has suggested 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 World Heritage Committee and the World Heritage Centre be revived".<sup>117</sup>

Other bodies that have called on the World Heritage Committee to align the implementation of the World Heritage Convention with the UNDRIP include the African Commission on Human and Peoples' Rights (ACHPR) and the IUCN World Conservation Congress. The ACHPR, the human rights body of the African Union that oversees the implementation of the *African Charter on Human and Peoples' Rights*, adopted a specific resolution on the protection of indigenous

114 See Appendix 5 of this volume and Human Rights Council 2014, p. 127, containing hyperlinks to both the letter of the Special Rapporteur and the reply received from the World Heritage Centre (Case No. OTH 10/2013). Also see UN Doc. A/HRC/27/52/Add.4.

115 EMRIP 2012, p. 7 (Proposal 9: World Heritage Committee). Similarly, EMRIP 2011, Annex, para. 38.

116 UNPFII 2011a, paras. 40-42; UNPFII 2011b.

117 UNPFII 2010b; 2011b.

peoples' rights in the context of the World Heritage Convention in 2011, in which it expresses concern over the fact that "there are numerous World Heritage sites in Africa that have been inscribed without the free, prior and informed consent of the indigenous peoples in whose territories they are located and whose management frameworks are not consistent with the principles of the UN Declaration on the Rights of Indigenous Peoples".<sup>118</sup> In particular, the resolution condemned the World Heritage Committee's 2011 listing of Lake Bogoria National Reserve in Kenya as a World Heritage site (as part of the "Kenya Lake System in the Great Rift Valley") without involving the indigenous Endorois community in the decision-making process and without obtaining their free, prior and informed consent.<sup>119</sup> The ACHPR urged the World Heritage Committee:

"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 UN Declaration on the Rights of Indigenous Peoples and that indigenous peoples' rights, and human rights generally, are respected, protected and fulfilled in World Heritage areas;" [and]

"... 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".<sup>120</sup>

Additionally, the ACHPR criticized IUCN for having recommended, in its capacity as an Advisory Body to the World Heritage Committee, the inscription of Lake Bogoria on the World Heritage List despite the lack of involvement of the Endorois in the nomination process. It therefore "urge[d] 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".<sup>121</sup>

This led, in 2012, to the adoption of a resolution entitled "*Implementation of the United Nations Declaration on the Rights of Indigenous Peoples in the context of the UNESCO World Heritage*

118 *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* (ACHPR 2011), Preamble. The full text of the resolution is reproduced in Appendix 1 of this volume.

119 The World Heritage listing of Lake Bogoria happened less than two years after the ACHPR's landmark ruling in the Endorois case (ACHPR 2009), in which it condemned the forcible eviction of the Endorois during the creation of the Lake Bogoria reserve in the 1970s. The ACHPR ordered Kenya to "Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land" and to "Pay adequate compensation to the community for all the loss suffered". The ACHPR also underlined that, in the case of any development projects that would have a major impact within the Endorois territory, "the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions" (para. 291). For details on the case, see Sing'Oei, this volume.

120 ACHPR 2011, paras. 2, 3.

121 *Ibid.*, para. 4.

*Convention*” by the IUCN World Conservation Congress, IUCN’s highest decision-making body.<sup>122</sup> The resolution notes that the World Conservation Congress shares the concerns of the ACHPR and requests that IUCN’s Director-General and Council (the principal governing body of IUCN) develop clear policy and practical guidelines to ensure that the principles of the UNDRIP are respected in IUCN’s work as an Advisory Body and that indigenous peoples are fully informed and consulted when sites are evaluated or missions undertaken on their territories.<sup>123</sup> In addition, the resolution urges the World Heritage Committee to revise the *Operational Guidelines* to ensure that indigenous peoples’ rights and all human rights are upheld and implemented in the management and protection of existing World Heritage sites and that no World Heritage sites are established in indigenous peoples’ territories without their free, prior and informed consent. It further urges the Committee to “work with State Parties to establish mechanisms to assess and redress the effects of historic and current injustices against indigenous peoples in existing World Heritage sites” and to “establish a mechanism through which indigenous peoples can provide direct advice to the Committee in its decision-making processes in a manner consistent with the right of free, prior and informed consent and the right to participate in decision making as affirmed in the [UNDRIP]”.<sup>124</sup>

## Conclusion

The repeated violations of indigenous peoples’ rights in World Heritage sites and in the processes of the World Heritage Convention are, in many ways, the result of the inadequacy of the Convention’s procedures and operational guidelines. They have drawn the attention of international human rights bodies and mechanisms and stand in sharp contrast to UNESCO’s mission, the principles upon which the Organization was founded and the overarching values which it promotes. The violations are damaging the reputation and credibility of UNESCO as an institution committed to furthering respect for human rights, cultural diversity, sustainable development and intercultural understanding and threaten to overshadow the positive role that the World Heritage Convention can undoubtedly play for indigenous peoples by helping them protect their lands, cultures and heritage. They are also incompatible with UNESCO’s vision that World Heritage sites should “serve as an example, and become conservation models for all sites, including those of more local interest”.<sup>125</sup>

While it is clear that awareness of the problems and the need for corrective action is growing within UNESCO, there are several factors that pose significant obstacles to aligning the implementation of the Convention with the principles and requirements of the UNDRIP. Chief

122 IUCN 2012. For the full resolution, see Appendix 2 of this volume.

123 IUCN 2012, para. 1.a. IUCN has begun to act on this request by making a number of improvements to its practice in evaluating World Heritage nominations. It has also concluded a review of its World Heritage evaluation processes in relation to questions related to communities and rights. See IUCN 2013, pp. ii-iii and the chapter by Larsen, Oviedo and Badman in this volume.

124 IUCN 2012, para. 2.

125 UNESCO 2004, para. 39.

among these may be the fact that, for many if not most States Parties to the Convention, including many of those serving as Members of the World Heritage Committee, the main interest in the World Heritage Convention today lies in the prestige, tourism profits and economic development that World Heritage sites can bring to a country or region. This has resulted in a climate and culture within the Committee where economic and political interests all too often override all other concerns, including human rights principles and even conservation considerations. The Director of the World Heritage Centre, Kishore Rao, recently remarked:

“[The] question is whether safeguarding our common heritage for present and future generations is the real motivation for identifying and adding sites to the World Heritage List, or has it been eclipsed by other considerations, such as economics and national prestige... [T]he general impression is often of intense pressure to have sites designated as World Heritage because of the expected economic benefits or the prestige involved. Perhaps we are failing in our narrative to effectively communicate a coherent message about the true objectives of the Convention...”<sup>126</sup>

At the same time, the World Heritage Committee acts, in many ways, as if the Convention existed in a vacuum and pays little to no regard to international legal standards developed in other intergovernmental forums or the legal obligations of States under other international instruments. In particular, the Committee has been oblivious to the developments in human rights law since the Convention's adoption in 1972, as evident from the fact that the *Operational Guidelines* to this day contain no references whatsoever to human rights standards or instruments.<sup>127</sup> Although the Member States of UNESCO have on many occasions jointly reaffirmed their commitment to human rights through resolutions, declarations and conventions adopted by the General Conference, these commitments have not been translated into the World Heritage context. For example, the *UNESCO Strategy on Human Rights*, adopted by the General Conference in 2003, has had no perceptible impact on the implementation of the World Heritage Convention. This lack of coherence and synergy is clearly not in the interests of UNESCO, and may in fact be contrary to its Constitution, according to which the end goal of any international collaboration under the umbrella of UNESCO is the furthering of universal respect for justice, the rule of law and human rights.<sup>128</sup> As the international law expert Luke T. Lee once wrote, in reference to Article 1 of the UNESCO Constitution:

“[T]he purpose of UNESCO is to further justice, the rule of law, human rights, and fundamental freedoms – a legal concept, objectively definable. International collaboration in the fields of education, science and culture is but a means to an end. To replace the

126 UNESCO 2013a, p. 83.

127 Noteworthy in this context is para. 44 of the *Operational Guidelines*, which contains a list of the Conventions the Committee considers relevant to the protection of cultural and natural heritage. None of the international human rights instruments are included in this list.

128 Art. 1 of the UNESCO Constitution.

end by the means, as has been done in many of its recent activities, would exceed the competence of UNESCO.”<sup>129</sup>

There have been some efforts by UNESCO in recent years to enhance respect for indigenous peoples' rights in the implementation of the World Heritage Convention.<sup>130</sup> In November 2011, when UNESCO launched the process to develop the planned house-wide Policy on Indigenous Peoples, which, once adopted, shall provide “guidance to staff *and committees* in order to effectively implement the UNDRIP in all components of UNESCO's work”,<sup>131</sup> Director-General Irina Bokova remarked that UNESCO, as the Secretariat for the World Heritage Convention, was “consciously working to improve and promote the free, prior and informed consent and the full and effective participation of indigenous peoples in the establishment and management of [World] Heritage sites”.<sup>132</sup>

The following year, the World Heritage Convention's 40<sup>th</sup> anniversary, celebrated by UNESCO under the theme of “World Heritage and Sustainable Development: the Role of Local Communities”, provided a framework for increased attention on the experiences of indigenous peoples with the Convention. UNESCO noted in a statement at the 2011 session of the Permanent Forum on Indigenous Issues that the anniversary would provide an excellent opportunity for indigenous peoples to engage with UNESCO and the World Heritage Committee and its Secretariat, “in order to address concerns that have been raised within the framework of the Permanent Forum and to work towards a constructive solution to the challenges that the [UNDRIP] brings to the international community as a whole”.<sup>133</sup> UNESCO also dedicated an edition of its quarterly magazine *World Heritage* to the issue of “World Heritage and Indigenous Peoples” during the anniversary year, including, among other things, an interview with the then Chair of the Permanent Forum, Myrna Cunningham.<sup>134</sup> At the Closing Event of the 40<sup>th</sup> anniversary in November 2012 in Kyoto, Japan, the Director of the World Heritage Centre called on the World Heritage Committee to seriously consider the Permanent Forum's appeal “for the principle of free, prior and informed consent to be introduced within the *Operational Guidelines*”.<sup>135</sup> UNESCO's Assistant Director-General for Culture, Francesco Bandarin, encouraged the Committee on the same occasion to reconsider the proposal to create a World Heritage Indigenous Peoples Council of Experts (WHIPCOE) in light of the adoption of the UNDRIP in 2007.<sup>136</sup>

129 Lee 1965, p. 740.

130 Additionally, there have been efforts by the Advisory Bodies to promote the use of human rights-based approaches in the World Heritage context. See Larsen, Oviedo and Badman, this volume; Ekern et al. 2012; and Sinding-Larsen 2012.

131 UNESCO 2014a, p. 3 (emphasis added).

132 UNESCO 2011b, at 00:06:20. Also see Bandarin 2012, p. 327: “The principle of free, prior and informed consent, as outlined in UNDRIP... will have major importance in UNESCO's policy development process with respect to indigenous peoples. In particular, as the current OGs of the World Heritage Convention do not explicitly make reference to the free, prior and informed consent of indigenous communities, continuing efforts will be made to respond to this challenge.”

133 UNESCO 2011c.

134 Cunningham 2012.

135 UNESCO 2013a, p. 84.

136 *Ibid.*, p. 43.

The 40<sup>th</sup> anniversary also provided the context for the organization of an “International Expert Workshop on the World Heritage Convention and Indigenous Peoples” by the Danish Agency for Culture, the Government of Greenland and IWGIA. Held in Copenhagen in September 2012, the workshop involved indigenous experts and human rights experts from around the world, as well as representatives of the Permanent Forum, EMRIP, UNESCO, IUCN and ICOMOS. Participants also included several of the authors of articles contained in this book. The workshop resulted in a “Call to Action” containing recommendations on how to align the implementation of the World Heritage Convention with the UNDRIP, as well as a set of proposed amendments to the Convention’s *Operational Guidelines* aimed at ensuring respect for indigenous peoples’ right to free, prior and informed consent in the context of World Heritage designations.<sup>137</sup> The workshop recommendations were presented to UNESCO and the States Parties of the World Heritage Convention during the Closing Event of the anniversary in Kyoto, Japan. Subsequently, the World Heritage Centre brought the results of the workshop to the attention of the World Heritage Committee’s 37<sup>th</sup> session in June 2013 in Phnom Penh, Cambodia, suggesting that the Committee consider implications for future revisions of the *Operational Guidelines*.<sup>138</sup>

Unfortunately, preliminary discussions by the Committee in a working group during the Phnom Penh session revealed significant reservations and opposition among some Committee members to adding provisions related to indigenous peoples and their rights to the *Operational Guidelines*, including from governments that voted for the adoption of UNDRIP and have repeatedly expressed their commitment to advancing recognition and respect for the rights of indigenous peoples as enshrined in the UNDRIP.<sup>139</sup> The Committee decided, however, to “re-examine the recommendations of this meeting [the Copenhagen expert workshop] following the results of the discussions to be held by the Executive Board on the UNESCO Policy on indigenous peoples”.<sup>140</sup>

One can therefore only hope that the adoption of the UNESCO Policy, together with the momentum generated by the World Conference on Indigenous Peoples, will provide the necessary impetus for the World Heritage Committee to finally adopt a human rights-based approach to its activities affecting indigenous peoples and take the necessary steps to ensure that the nomination, designation, management and protection of World Heritage sites consistently occurs in accordance with the principles affirmed in the UNDRIP. Considering the high visibility of the World Heritage Convention and its role as one of UNESCO’s flagship programs, it is clear

137 For the Call to Action see Appendix 3 of this volume. The proposed amendments to the *Operational Guidelines* are available at [http://www.iwgia.org/news/search-news?news\\_id=678](http://www.iwgia.org/news/search-news?news_id=678) and <http://whc.unesco.org/en/events/906/>. For the report of the expert workshop see Disko and Tugendhat 2013.

138 UNESCO 2013d, p. 26 (Draft Decision 37 COM 5A, para. 6) and UNESCO 2013e, paras. 12, 13.

139 Personal observation by Stefan Disko. A main reason for the reservations and opposition of governments appears to be doubts about the concept and definition of ‘indigenous peoples’, which seem particularly prevalent in the African context. To clarify such doubts, the “Pan-African Forum for a Culture of Peace”, organized jointly by UNESCO, the African Union (AU) and the Government of Angola in March 2013, made the following recommendation: “The AU, supported by the United Nations system, should ensure the wide dissemination of the reports of the [ACHPR], and the relevant clauses of the African Charter, which clarify the definition and status of indigenous peoples in the African context, so as to help dispel widespread misunderstandings and misinterpretations” (UNESCO 2013b, p. 11). For the respective reports see ACHPR 2005 and ACHPR 2006.

140 Decision 37 COM 12.II, para. 7.

that this is crucial not only for the credibility of the Convention itself but also for the credibility of UNESCO as a whole. ○

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