

UNESCO DOCUMENTS AND PROCEDURE: THE NEED TO ACCOUNT FOR POLITICAL CONFLICT WHEN DESIGNATING WORLD HERITAGE SITES

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I. INTRODUCTION

The United Nations Educational, Scientific, and Cultural Organization's (UNESCO) World Heritage Convention has been called "the most successful global instrument for the protection of cultural and natural heritage,"¹ while also being criticized as "an instrument of 'foreign domination.'"² Adopted by the United Nations in 1972, the World Heritage Convention (the Convention) is intended to identify, protect, and preserve cultural and natural heritage sites of "outstanding universal value" around the world.³ Currently, 890 sites are protected under the Convention,⁴ but not all of these listings were accepted without controversy.⁵ The most recent controversial listing involves a border dispute between Thailand and Cambodia. The controversy surrounds the Temple of Preah Vihear and its inclusion on the World Heritage List (the List) as a Cambodian site.⁶

When determining whether a site should be inscribed on the List, the World Heritage Committee primarily determines whether the site meets one or more of ten criteria for "outstanding universal value."⁷ A secondary consideration

¹ Raechel Anglin, Note, *The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide*, 20 YALE J.L. & HUMAN. 241, 247 (2008) (quoting Australian Government, The World Heritage Convention, <http://www.environment.gov.au/heritage/apfp/heritage/convention.html> (last visited Nov. 9, 2009)).

² Natasha Affolder, *Democratising or Demonising the World Heritage Convention?*, 38 VICT. U. WELLINGTON L. REV. 341, 341 (2007) (quoting Amy Ridenour, *Keep the Statute of Liberty Free: An Argument for Congressional Oversight of UN Land Designations in the US*, NAT'L POL'Y ANALYSIS No. 419 (July 2002), <http://www.nationalcenter.org/NPA419.html>).

³ United Nations Educational, Scientific and Cultural Organisation [UNESCO], Convention Concerning the Protection of the World Cultural and Natural Heritage arts. 1-2, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention].

⁴ UNESCO.org, World Heritage List, <http://whc.unesco.org/en/list> (last visited Nov. 9, 2009).

⁵ See, e.g., The Permanent Observer of Palestine, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, ¶ 1, delivered to the Security Council and the General Assembly, U.N. Doc. A/55/944-S/2001/491 (May 17, 2001) (reproducing additions to a letter dated 15 May 2001 from the Permanent Observer of Palestine to the United Nations addressed to the Secretary-General "condemn[ing] Israel's dubious attempts to assert its sovereignty over Jerusalem and certain areas of the West Bank by seeking to have a number of archeological sites . . . inscribed on the World Heritage List").

⁶ See *Khmer's Hun Sen Congratulates Thai PM*, NATION (Thail.), Sept. 20, 2008, http://www.nationmultimedia.com/2008/09/20/politics/politics_30083957.php (noting that "Cambodia and Thailand have locked horns . . . since June when Phnom Penh proposed to list the 11th-century Hindu temple of Preah Vihear as a World Heritage site").

⁷ UNESCO, Intergov't Comm. for Prot. of World Cultural & Nat. Heritage, *Operational*

is that each potential site must meet certain “conditions of integrity and/or authenticity.”⁸ Finally, the nominating state must ensure that an adequate system of protection and management of the site is in place prior to inscription on the List.⁹ Absent from the selection criteria and the nomination and selection processes at large, however, is any mechanism for dealing with sites which are the source of, or otherwise involved in, political dispute.

This Note focuses on the current Thai-Cambodian dispute over the selection of the Temple of Preah Vihear and also examines disputes concerning sites in Eastern Asia, the Middle East, and Africa in light of the lack of a formal provision dealing with political unrest surrounding site selection and management. Ultimately, this Note argues for the inclusion of an explicit mechanism to address political conflict in the Operational Guidelines for the Implementation of the World Heritage Convention (the Guidelines) and the creation of a UNESCO arbitrational body to resolve such conflicts as they arise in the nomination and selection processes.

Part II examines the legal documents governing UNESCO, including the World Heritage Convention and the nomination and selection processes outlined in the Guidelines. Part III explores disputed site inscriptions by focusing on the history of the Thai-Cambodian conflict surrounding the Temple of Preah Vihear and its selection as a World Heritage Site in July 2008. This part also examines disputes involving sites in China and the Koreas, Jerusalem, and Virunga National Park in the Congo. Part IV proposes changes to the Guidelines in accordance with the World Heritage Convention such that the Selection Committee, when deciding whether or not to inscribe a site on the List, would explicitly weigh certain political considerations: notice of intent to nominate a site for inscription, independent legal support, conduct under general principles of international law, and expressions of commitment. Finally, this Note proposes that a UNESCO arbitrational body be created to resolve such future disputes.

Guidelines for the Implementation of the World Heritage Convention, ¶ 77, U.N. Doc. WHC. 08/01 (Jan. 2008) [hereinafter *Guidelines*].

⁸ *Id.* ¶ 78.

⁹ *Id.*

II. UNESCO DOCUMENTS AND PROCEDURE

A. *The World Heritage Convention*

The General Conference of UNESCO adopted the World Heritage Convention on November 16, 1972, but the momentum for an international cooperative effort to protect cultural heritage began building much earlier, soon after World War I.¹⁰ The primary impetus for the creation of such an international body occurred in the late 1950s when the Egyptian government announced its decision to build the Aswan High Dam.¹¹ This dam would have flooded a valley containing some of Ancient Egypt's most important cultural and architectural creations, most notably the Abu Simbel temples.¹² Protecting the threatened temples by relocating them required approximately \$80 million, half of which was given by over fifty nations in a demonstration of international cooperation.¹³ Similarly, efforts for the international protection of natural treasures arose at a 1965 White House conference calling for a "World Heritage Trust," and continued in 1968 when the International Union for Conservation of Nature drafted a similar proposal.¹⁴ In Stockholm, at the 1972 United Nations Conference on the Human Environment, the Assembly first considered these two proposals; the proposals were then merged into a single document, which the General Conference of UNESCO adopted as the Convention on November 16th of that year.¹⁵

The World Heritage Sites, which are considered exceptional examples of cultural and natural importance for all of humanity,¹⁶ are administered by the UNESCO World Heritage Committee.¹⁷ Inscription on the World Heritage List is important to the nation that is home to the site because it gives that nation

¹⁰ UNESCO.org, The World Heritage Convention, <http://whc.unesco.org/en/convention/> (last visited Nov. 9, 2009).

¹¹ *Id.*

¹² *See id.* (calling the Temples "a treasure of Egyptian civilization").

¹³ *Id.* The preservation costs for the project were substantial because the Egyptian government decided to follow through with its plans to build the Aswan High Dam. The Abu Simbel and Philae temples had to be "dismantled, moved to dry ground and reassembled." *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ World Heritage Convention, *supra* note 3, pmb1.

¹⁷ UNESCO.org, World Heritage Committee, <http://whc.unesco.org/en/committee/> (last visited Nov. 9, 2009).

access to the World Heritage Fund and potential assistance from a variety of other international sources.¹⁸ Moreover, inscription raises public awareness and can result in increased tourism.¹⁹ As of the publication of this Note, 890 sites have been protected under the Convention.²⁰

B. The Operational Guidelines for the Implementation of the World Heritage Convention

While the Convention defines criteria for inscription of cultural and natural heritage sites in deliberately broad terms,²¹ Article 11 charges the World Heritage Committee (the Committee) with defining specific selection criteria.²² The Committee fulfilled this provision by embodying more specific selection criteria in the Guidelines.²³ In order to be inscribed on the List, a site must meet at least one of these more specific criteria, which are outlined in the most recent version of the Guidelines.²⁴ Under the Guidelines, “[n]ominated properties shall”:

- (i) represent a masterpiece of human creative genius;
- (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;
- (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;

¹⁸ UNESCO.org, Benefits of Ratification, <http://whc.unesco.org/en/convention/#Benefits-of-Ratification> (last visited Nov. 9, 2009).

¹⁹ *Id.*; see also Clem Tisdell & Clevo Wilson, *World Heritage Listing of Australian Natural Sites: Tourism Stimulus and Its Economic Value*, 32 *ECON. ANALYSIS & POL’Y* 27, 29 (2002) (noting that World Heritage listing may “promote[] increased tourism” and “raise[] the tourism economic value of natural sites because such listing acts as a signalling device”).

²⁰ World Heritage List, *supra* note 4.

²¹ See World Heritage Convention, *supra* note 3, arts. 1–2 (describing in broad terms the range of monuments, buildings, places, and natural features that could be protected under the Convention).

²² *Id.* art. 11(2), (5).

²³ *Guidelines*, *supra* note 7, ¶¶ 77–79.

²⁴ *Id.* ¶ 77.

- (iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history;
- (v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change;
- (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria);
- (vii) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;
- (viii) be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features;
- (ix) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals;
- (x) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.²⁵

Importantly, the Guidelines do not require the Committee to directly consider any relevant political discord surrounding proposed sites.

²⁵ *Id.*

C. Sites of Potential Conflict

Although the Committee is not explicitly bound to consider political discord in its decisions, the Convention and Guidelines are not entirely silent as to potential disputes. The Convention indicates that state consent is required for inclusion on the List, and further indicates that “inclusion of a property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State shall in no way prejudice the rights of the parties to the dispute.”²⁶ While this provision acknowledges the potential for political conflict surrounding inscription of disputed sites, it fails to offer any guidance as to how such disputes should be resolved or factored into the decision to add a site to the List. Because the Convention indicates that disputed sovereignty over a property would not prejudice the rights of the disagreeing parties to later seek inscription under their respective names, it provides no incentive for the parties to resolve the conflict themselves before seeking inscription.

If the Convention allowed for penalties against parties who fail to resolve conflicts peacefully during the inscription process, then it might incentivize nations to resolve disputes without violence or unsolicited third-party intervention.

The Guidelines include more direction about site disputes than does the Convention by listing criteria for placement on the List of World Heritage in Danger, a list of threatened sites.²⁷ Relevant to consideration of sites exposed to dangerous conditions is the inclusion of factor (v), “outbreak or threat of

²⁶ World Heritage Convention, *supra* note 3, art. 11(3). The Guidelines contain a provision for “transboundary nominations,” which must conform to Article 11(3) “whenever possible,” and recommend that “States Parties concerned establish a joint management committee or similar body to oversee the management of the whole of a transboundary property.” *Guidelines*, *supra* note 7, ¶ 135. However, this provision is silent as to cases where State Parties do not cooperate, as where sites are located on disputed borders.

²⁷ *Guidelines*, *supra* note 7, ¶¶ 177–191. Instead of focusing on political conflict arising between states, the *Guidelines* acknowledge the likely tension between individual state sovereignty and the global interest in heritage preservation by stating the ideal that “[w]hile fully respecting the sovereignty of the States on whose territory the cultural and natural heritage is situated, States Parties to the *Convention* recognize the collective interest of the international community to cooperate in the protection of this heritage.” *Id.* ¶ 15; *see also* Affolder, *supra* note 2, at 341–42 (examining “the extent to which problems of democracy can threaten to undermine a regime created to hold states accountable for the protection of heritage within their borders”).

armed conflict.”²⁸ Consequently, a site that may be harmed by armed conflict could be placed on the list of threatened sites to receive immediate assistance allocated by the Committee from the World Heritage Fund.²⁹ The Guidelines also instruct Committee members to bear in mind that “it is often impossible to assess certain threats—such as the threat of armed conflict—as to their effect on cultural or natural properties”³⁰ This exhortation, while not a bright-line rule, urges members to consider the problems associated with protecting sites in battle zones. The armed-conflict factor is the closest that any of UNESCO’s governing documents come to expressly acknowledging political discord when considering sites for inclusion on the List.

There are also certain procedural mechanisms, specifically in the nomination and selection processes, that incorporate considerations of politically sensitive issues. One example is the rule that only State Parties, nations having signed the Convention, may submit proposals for properties within their boundaries to be considered for inscription on the List.³¹

There are several steps in this process and each provides a possible safeguard. First, a State Party must submit a “Tentative List,” an inventory of potential sites for inscription; the Committee cannot consider a site for nomination unless it has been previously listed on that Party’s Tentative List.³² Second, the State Party must prepare a nomination file, including exhaustive documentation and maps, which “the World Heritage Centre sends . . . to the appropriate Advisory Bodies for evaluation.”³³ Third, the International Council

²⁸ See *Guidelines*, *supra* note 7, ¶ 179(b) (including other factors that “could have deleterious effects on [the] inherent characteristics” of a site).

²⁹ UNESCO.org, World Heritage in Danger, <http://whc.unesco.org/en/158/> (last visited Nov. 9, 2009).

³⁰ *Guidelines*, *supra* note 7, ¶ 182(c)(ii).

³¹ UNESCO.org, World Heritage List Nominations, <http://whc.unesco.org/en/nominations/> (last visited Nov. 9, 2009).

³² *Id.* This requirement could function as a procedural check for nations disputing sovereignty over sites because inclusion on a State Party’s Tentative List would serve as notice that the nation believes the site in question to be under its sovereignty. A State Party might be less likely to include a disputed site on its Tentative List if it feared doing so would incite hostility with a neighboring country. UNESCO’s webpage includes a link to all proposed sites listed on a party’s Tentative List, providing other nations with easy access to this information. UNESCO.org, Tentative Lists, <http://whc.unesco.org/en/tentativelists/> (last visited Nov. 20, 2009).

³³ World Heritage List Nominations, *supra* note 31. The extensive nomination file requirements may function as another procedural check because, if the site truly was disputed, the State Party’s record would likely be considered incomplete with respect to the Committee’s rigorous standards. See, e.g., ROYAL GOV’T OF THE KINGDOM OF CAMBODIA, THE TEMPLE OF

on Monuments and Sites (ICOMOS) and the World Conservation Union (IUCN) independently evaluate the nomination file and provide the Committee with evaluations of the nominated sites.³⁴ The World Heritage Committee makes its final decision (pursuant to the selection criteria listed in the Guidelines) at a meeting held once a year for that express purpose.³⁵ If necessary, the Committee can “defer its decision and request further information on sites from the States Parties.”³⁶

Thus, while UNESCO’s governing documents acknowledge sources of political conflict, and the nomination and selection processes contain implicit checks to discourage inscription of disputed sites, express guidance regarding disputed sites is lacking. Several real-world examples serve as informative case studies of the political ramifications stemming from the Committee’s failure to consider political strife in the selection process for inscribing sites on the World Heritage List.

III. DISPUTES OVER WORLD HERITAGE INSCRIPTION

A. Introduction

Government protest over World Heritage inscription is not uncommon. While some outcries result in violent conflict, most are formalistic and unaccompanied by violent threats, economic embargo or any other form of coercion.³⁷

PREAH VIHEAR: PROPOSED FOR THE INSCRIPTION ON THE WORLD HERITAGE LIST (UNESCO) (Council of Ministers eds., 2008), *available at* http://www.rfi.fr/cambodgien/actu/images/107%5CPreahVihear_Proposed_for_inscription_on_UNESCO.pdf (exemplifying the amount of detail typically included in nomination files). Moreover, the map requirement played an important role in the *Temple of Preah Vihear* case discussed below. *Temple of Preah Vihear* (Cambodia v. Thailand), 1962 I.C.J. 6 (June 15) (merits).

³⁴ World Heritage List Nominations, *supra* note 31. A third body, the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), provides the Committee with “expert advice” on protection of cultural sites. *Id.*

³⁵ *Id.*

³⁶ *Id.* Though the Committee has not expressly stated it, the ability to defer and request additional information may be yet another procedural mechanism by which the Committee may weigh political stability when making an inscription determination. Specifically, the ability to defer a decision may allow the Committee to base its decision on a long-term evaluation of the dispute.

³⁷ See UNESCO, World Heritage Committee, 20th Sess., Mérida, Mex., Dec. 2–7, 1996, *Report of the Twentieth Session*, Annex V, U.N. Doc. WHC-96/CONF.201/21 (Mar. 10, 1997)

For example, when the site of the atomic blast in Hiroshima, Japan was added to the List, China expressed “reservations” and the U.S. delegate to the U.N. dissociated from the inscription decision.³⁸ China argued that listing of Japan’s Hiroshima might downplay the fact that “it was the other Asian countries and peoples who suffered the greatest loss” during World War II.³⁹ The U.S. delegate dissociated on the contention that war sites should be outside the scope of the Convention and also that “events antecedent to the United States’ use of atomic weapons to end World War II are key to understanding the tragedy of Hiroshima; [thus,] [a]ny examination of the period leading up to 1945 should be placed in the appropriate historical context.”⁴⁰ The Hiroshima case differs from those of Preah Vihear and the Jerusalem sites (discussed below) in that, although the inscription of the Hiroshima site incited controversy, the site itself does not sit on disputed territory. In general, such protest is innocuous and is to be expected as a form of political posturing; this type of opposition generally lacks the threat of conflict.⁴¹

B. The Temple of Preah Vihear

The most notable current dispute surrounding a site’s registration on the World Heritage List involves the Temple of Preah Vihear, located on the Thai-Cambodian border. Initially built as a mountain hermitage, the Temple was constructed on a site chosen by Suryavarman I,⁴² an eleventh century king of the Khmer Empire,⁴³ on a promontory of the Dangrek mountain range

(illustrating the type of formalistic dispute common to inscription protests).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* Interestingly, despite the United States’ protest that war sites should not be considered within the scope of the Convention, La Fortaleza, a fort in San Juan, Puerto Rico, was listed as an American World Heritage Site in 1983 because it “reflects developments in military architecture during its service over the centuries as a fortress, an arsenal, [and] a prison . . .” UNESCO.org, La Fortaleza and San Juan National Historic Site in Puerto Rico, <http://whc.unesco.org/en/list/266> (last visited Nov. 9, 2009).

⁴¹ These are not the type of conflicts this Note seeks to thoroughly examine but are relevant in understanding the different degrees of controversy surrounding inscriptions. The largely formalistic political stances, like that taken by the United States with regard to Hiroshima, contrast with violent conflicts, like that occurring between Thailand and Cambodia.

⁴² CLAUDE JACQUES & PHILIPPE LAFOND, *THE KHMER EMPIRE: CITIES AND SANCTUARIES, FIFTH TO THE THIRTEENTH CENTURIES* 149 (Tom White trans., River Books 2007).

⁴³ *Id.* at 139.

over 1,722 feet above a Cambodian plain.⁴⁴ This unique mountain-top position means that, despite the fact that the temple is located on Cambodian territory, the only easy route of access to it is from the Thai side of the border.⁴⁵

The cultural significance of this temple derives, in part, from a divine event in Buddhist history. Expansive renovations by Suryavarman I were supposedly inspired by the miraculous manifestation in physical form of a god on Earth.⁴⁶ As a testament to this miracle, an inscription at the site reads, "His Majesty, by the strength of his asceticism, brought it about that the god Bhadresvara of Lingapura came to reign over Shri Shikhareshvara to manifest his power visibly, for the world to behold."⁴⁷

The dispute between Thailand and Cambodia over the Temple can be traced back to a series of boundary settlements moderated by France from 1904 to 1908, while France was conducting the foreign relations of Indo-China and Siam.⁴⁸ Cambodia was, at that point, part of Indo-China.⁴⁹ Of crucial importance was the Treaty of 13 February 1904, which established the general border between Thailand and Cambodia, leaving it to a Franco-Siamese Mixed Commission (Mixed Commission) to determine the exact boundary.⁵⁰ In the eastern portion of the Dangrek Mountain Range where Preah Vihear is located, the boundary was to follow the "watershed line."⁵¹ At a meeting on December 2, 1906, the parties agreed that the Mixed Commission would travel along the mountain range to carry out reconnaissance, with a French official to survey the eastern part of the range to determine the exact boundary.⁵² Although the minutes of the meetings that occurred after December 2, 1906 contain no record of any boundary decisions, the plans were carried out, and

⁴⁴ *Id.* at 149 (noting that the promontory is 525 meters above the Cambodian plain).

⁴⁵ *Gunfight on Thai-Cambodia Border*, BBCNEWS, Oct. 15, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7668657.stm>. Because the mountain-top location restricts access from the Cambodian side, most tourists "cross the Thai border to enter Preah Vihear, where a Cambodian flag flies prominently and a sign proclaims: 'I am proud to be a Khmer.' " *In Pictures: Preah Vihear*, BBCNEWS, May 22, 2008, http://news.bbc.co.uk/2/hi/in_pictures/7352186.stm (caption to first picture).

⁴⁶ JACQUES & LAFOND, *supra* note 42, at 149.

⁴⁷ *Id.*

⁴⁸ *Temple of Preah Vihear (Cambodia v. Thail.)*, 1962 I.C.J. 6, 16 (June 15) (merits).

⁴⁹ *Id.*

⁵⁰ *Id.* at 17.

⁵¹ *Id.*

⁵² *Id.* at 17-18.

the President of the French section reported to the French Government in January of 1907 that the frontier-line had been established.⁵³

The final stage of delineating the border required the production of maps.⁵⁴ Because the Siamese government "did not dispose of adequate means" for "the execution of this technical works," it requested that French officers map the region.⁵⁵ The French officers completed "a series of eleven maps" in the fall of 1907, and the maps were then given to the Siamese government.⁵⁶ Significantly, one of these maps placed Preah Vihear on the Cambodian side of the border.⁵⁷ The Mixed Commission never formally approved this map because the Commission dissolved several months before production of the official map.⁵⁸

In direct opposition to the French officers' findings, surveys conducted by Thailand between 1934 and 1935 indicated that, based on the "true" location of the watershed line, the Temple was actually located in Thailand.⁵⁹ Despite this revelation, the Thai Government continued to rely on and publish maps indicating Preah Vihear's location on the Cambodian side of the border.⁶⁰ Furthermore, when Prince Damrong of Siam visited the Temple in 1930, Siam (now Thailand) did not protest his official reception by Preah Vihear Province's French Resident.⁶¹ This would have been an opportune time for Siam to contest Cambodian control of the site because Prince Damrong probably would have considered reception by another government an affront to Siamese sovereignty. However, Siam did not protest; moreover, Thailand failed to object to the map in question during negotiations with Cambodia concerning the 1925 and 1937 Franco-Siamese treaties over frontiers, where "it would have been natural for Thailand to raise the matter, if she considered the map . . . to be incorrect."⁶² Thailand similarly failed to raise the issue before the Franco-Siamese Conciliation Commission in Washington, D.C. in 1947, although this "was an outstanding opportunity for Thailand to claim

⁵³ *Id.* at 18.

⁵⁴ *Id.* at 20.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 26.

⁵⁸ *Id.* at 21.

⁵⁹ *Id.* at 27.

⁶⁰ *Id.*

⁶¹ *Id.* at 30.

⁶² *Id.* at 27-28.

a rectification.”⁶³ In fact, Thailand failed to raise the issue until 1958, in a series of negotiations with Cambodia in Bangkok.⁶⁴

The Thai-Cambodian dispute came to a head in 1962 in the International Court of Justice (ICJ) when Cambodia brought charges against Thailand, and the Court determined that the Temple belonged to Cambodia.⁶⁵ At trial, Cambodia relied on the map in question in support of its claim of sovereignty over Preah Vihear.⁶⁶ Thailand countered, first, that the map was not authoritative because it was not the work of the Mixed Commission; second, the boundary shown was not accurate because it did not follow the true watershed line as required by the Treaty of 13 February 1904; third, a boundary along the watershed line would place the Temple in Thailand; fourth, Thailand never accepted the map; and alternatively, that if Thailand had accepted the map it had mistakenly done so, believing that the watershed line on the map was accurate.⁶⁷ Thailand also argued that it had no need to raise the issue until 1958 because it had maintained possession of Preah Vihear “at all material times.”⁶⁸

The Court concluded that when the map was initially drafted it had no binding authority.⁶⁹ However, it went on to hold that the boundaries established by that map would remain because Thailand failed to raise any objection for over twenty years after discovering the error through the more accurate survey.⁷⁰

Put simply, the Court applied the laches doctrine to an international border dispute. The decision was especially notable because “it amounted to a finding that, in a conflict between a map not even referred to in the agreement or signed by the parties and a boundary definition described in a treaty, the map prevailed.”⁷¹ However, the judicial decision did not quell the ongoing border dispute, which continues today.⁷²

⁶³ *Id.* at 28.

⁶⁴ *Id.* at 27.

⁶⁵ *Id.* at 36.

⁶⁶ *Id.* at 21.

⁶⁷ *Id.*

⁶⁸ *Id.* at 29.

⁶⁹ *Id.* at 21.

⁷⁰ *Id.* at 32.

⁷¹ Hyung K. Lee, Comment, *Mapping the Law of Legalizing Maps: The Implications of the Emerging Rule on Map Evidence in International Law*, 14 PAC. RIM L. & POL’Y J. 159, 171 (2005).

⁷² See Editorial, *Rallies Must Not Spill Over*, BANGKOK POST, Sept. 15, 2009, at News,

The dispute gained new life when Cambodia petitioned UNESCO to inscribe Preah Vihear as a World Heritage Site in early 2008. On June 18th, Thai Foreign Minister Noppadon Pattama signed a joint communiqué with Cambodia, signaling the parties' intent to cooperate in a joint attempt to have Preah Vihear listed as a World Heritage Site.⁷³ However, a week after the signing of the joint communiqué, in which the Thai Cabinet approved a Cambodian map that would be submitted to UNESCO as part of its listing requirements, Var Kimhong, Cambodia's border committee chairman, announced the closing of the border crossing in response to a rally held by Thai protestors at the Temple's gate.⁷⁴ On July 8th, the Thai Constitution Court declared the joint communiqué unconstitutional.⁷⁵ The Thai Court's ruling caused political discord in Thailand when opponents of ousted Prime Minister Thaksin Shinawatra used it to incite nationalist fervor; the opposition party asserted they would file petitions to impeach the Cabinet of Thailand following the Court's ruling that Bangkok's support for Cambodia's inscription on the World Heritage List was illegal.⁷⁶ That same day, UNESCO listed Preah Vihear as a Cambodian World Heritage Site and Cambodians took to the streets in celebration while Thais entered the Temple—which remained closed—in protest.⁷⁷ As part of the fallout from the Constitution Court decision, three

available at <http://bangkokpost.com/opinion/opinion/23859/rallies-must-not-spill-over> (noting that unrest continues over Preah Vihear and rallies threaten to escalate to violence).

⁷³ See Nophakhun Limsamarnphun, Opinion, *Cambodia Should Consider Joint Inscription of Preah Vihear Site*, NATION (Thail.), June 28, 2008, <http://www.nationmultimedia.com/seach/read.php?newsid=30076732&keyword=Cambodia+should+consider+joint+inscription+Preah+Vihear+Site> (describing goals of the joint communiqué signed June 18, including the naming of Preah Vihear as a World Heritage Site).

⁷⁴ Komfie Manalo, *Cambodia Closes Border with Thailand at Preah Vihear Temple*, June 24, 2008, ALL HEADLINE NEWS, <http://www.allheadlinenews.com/articles/7011368406>.

⁷⁵ *Joint Communiqué with Cambodia is Unconstitutional*, NATION (Thail.), July 8, 2008, http://nationmultimedia.com/2008/07/08/headlines/headlines_30077585.php. The Constitution Court voted eight to one because Pattama had failed to secure necessary parliamentary support. The Court held that "[t]he Joint communiqué with Cambodia is considered a treaty in accordance with the Vienna Convention [of] 1969 and the Thai Constitution's Article 190" which means that it requires parliamentary approval before signing. *Id.*

⁷⁶ Pracha Hariraksapitak, *Thai Rulings Fuel Election Talk, PM Not Worried*, REUTERS, July 9, 2008, <http://www.reuters.com/article/rbssInvestmentServices/idUSBKK2838520080709?sp=true>.

⁷⁷ Jonathan Head, *Political Tensions Driving Temple Row*, BBC NEWS, July 15, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7507425.stm>.

Thai ministers, including Foreign Minister Pattama who had approved the joint communiqué, were forced to resign.⁷⁸

In the days following, both nations continued to build troop numbers along the disputed border, although Thai and Cambodian leaders were planning a peaceful discussion while Cambodia urged the withdrawal of Thai soldiers.⁷⁹ By mid-July, approximately 1,500 combined Thai and Cambodian troops had been stationed along the border.⁸⁰ Cambodia finally sought help from the UN Security Council “to avoid armed confrontation” after bilateral discussions at the Association of Southeast Asian Nations (ASEAN) failed to produce an agreement.⁸¹ However, Thailand rejected third-party mediation.⁸²

On October 3rd, the troops stationed on the border exchanged gunfire for the first time; at least three soldiers were injured in the brief confrontation.⁸³ Following the incident, Cambodia’s Prime Minister, Hun Sen, and Thailand’s Foreign Minister, Sompong Amornwiwat, met in an effort to normalize the situation, but the parties failed to come to a formal agreement.⁸⁴ On October 15th, Thai and Cambodian troops “exchange[d] . . . small arms fire and rocket-propelled grenades . . . for about an hour”; two Cambodians were killed and several soldiers on both sides were injured.⁸⁵ Following the clash, “Thailand alerted air force jets and readied transport planes” in case they were needed to evacuate Thai citizens from Cambodia as both sides attempted to negotiate a ceasefire.⁸⁶

The situation remained tense in the following two months, but “[o]n November 12, [Cambodian] Foreign Minister Hor Namhong and his Thai counterpart agreed . . . to reduce the troop buildup” and to establish the Thai-

⁷⁸ *Id.*

⁷⁹ *See Troop Build-up at Hill-Top Temple*, BBC NEWS, July 17, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7511417.stm> (noting that 400 Thai troops and 800 Cambodian troops were stationed in the area).

⁸⁰ *UN Help Sought over Temple Row*, BBC NEWS, July 22, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7518741.stm>.

⁸¹ *Id.*

⁸² *See id.* (noting that “Thailand wants to resolve the dispute at a bilateral level” instead).

⁸³ *Three-Minute Border Skirmish Causes Injuries on Both Sides*, FRANCE 24, Oct. 3, 2008, <http://www.france24.com/en/20081003-border-skirmish-injuries-cambodia-thailand-temple-Si-Sa-Ket>.

⁸⁴ *Cambodia Warns Thailand to Stop Trespassing*, USA TODAY, Oct. 13, 2008, http://www.usatoday.com/news/world/2008-10-13-107655911_x.htm.

⁸⁵ *Gunfight on Thai-Cambodia Border*, *supra* note 45.

⁸⁶ *Id.*

Cambodian Joint Border Commission, charged with demarcating and demining the area near Preah Vihear.⁸⁷ In an unrelated incident, widespread protests swept across Thailand in the aftermath of the Thai Court's decision that Prime Minister Samak Sundaravej had breached the Constitution and was forced to resign.⁸⁸ The turmoil virtually suspended all of the Border Commission's work, but incidentally resulted in decreased troop numbers.⁸⁹ In late December, the parties agreed to resume talks at the end of January 2009.⁹⁰ As this Note goes to publication, the border conflict remains ongoing. While the violence stems largely from independent political disputes between Thailand and Cambodia, the World Heritage inscription process contributed significantly to the controversy.

Despite safeguards in the UNESCO selection process and the Guidelines' exhortations to consider the potential for violent dispute, UNESCO seems to have paid little attention to the potential for armed conflict that resulted from the listing of Preah Vihear as a Cambodian World Heritage Site. For instance, in Thailand, nationalistic and militaristic sentiments were escalating as its government was crumbling. Such signs did not bode well for a peaceful resolution of the historical border dispute between Thailand and Cambodia.

Weighing in UNESCO's favor was the ICJ decision holding that the Temple was situated on Cambodian territory⁹¹ and the fact that Thai Foreign Minister Pattama, early in the summer of 2008, signaled an intent to cooperate with Cambodia to have the Temple listed as a Cambodian site.⁹² In the end, however, as UNESCO was making its final decision with respect to Preah Vihear, Thailand's highest court was ruling on the illegality of the joint

⁸⁷ Cheang Sokha, *Thailand's Turmoil Delays Border Work*, PHNOM PENH POST, Dec. 16, 2008, <http://khmernews.net/2008/12/thailands-turmoil-delays-border-work/>.

⁸⁸ *See Court Says Thai PM "Must Resign,"* BBC NEWS, Sept. 9, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7605838.stm> (stating that the Court ruled Sundaravej violated Article 267 of the constitution, which prohibits ministers from "having outside interests," when the prime minister received compensation for hosting a TV cooking show called "Tasting and Grumbling").

⁸⁹ *See* Sokha, *supra* note 87 (noting that troop levels were reduced to a combined total of sixty men—thirty on each side—"at the front line near the temple").

⁹⁰ *Cambodian-Thai Border Talks Set for January*, CHINA VIEW, Dec. 29, 2008, http://news.xinhuanet.com/english/2008-12/29/content_10573505.htm.

⁹¹ *Temple of Preah Vihear (Cambodia v. Thai.)*, 1962 I.C.J. 6 (June 15) (merits).

⁹² *Temple of Gloom: Court Verdict Stuns Government*, NATION (Thail.), July 9, 2008, http://www.nationmultimedia.com/2008/07/09/headlines/headlines_30077664.php.

communiqué and Cambodian officials were closing the border in response to Thai protests. These would be the ultimate signs of problems ahead.

C. The Koguryo Sites

In another rancorous dispute, China, North Korea, and South Korea contested each other's claims to a number of ruins dating back to the Koguryo (Goguryeo) era.⁹³ The claims centered on whether Koguryo was an independent Korean kingdom or part of a larger Chinese nation.⁹⁴

Regional tensions flared in 2004 when China applied to have several sites inscribed on the World Heritage List, though North Korea had applied for inscription of the sites two years earlier.⁹⁵ Both nations claimed ownership to the

sites on an ethnic basis, and each lays archaeological and historical claim to the region and its heritage as the historical patrimony of its people. Thus, in both countries, ownership of national heritages and historic relics is deemed imperative in establishing hegemony or legitimacy in the border region, and in asserting sovereignty over the past.⁹⁶

China interpreted Korean "historical claims to the region and its artistic legacy as posing the threat of irredentism."⁹⁷ In other words, China may be seeking to secure a claim to the sites out of a political concern that, should the North Korean government fail, ethnic Koreans living in Manchuria—where many of the remains are located—may attempt to secede and join a unified Korea if the remains are not considered Chinese territory.⁹⁸

⁹³ Yonson Ahn, *The Contested Heritage of Koguryo/Gaogouli and China-Korea Conflict*, JAPAN FOCUS, Jan. 11, 2008, <http://japanfocus.org/-Yonson-Ahn/2631>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Mark Byington, *The War of Words Between South Korea and China over an Ancient Kingdom: Why Both Sides Are Misguided*, HISTORY NEWS NETWORK, Sept. 6, 2004, <http://hnn.us/articles/7077.html> (positing that one reason for China's claim to Koguryo may be due to fears that "any admission that Koreans might have a valid historical claim to some PRC territories might incite unrest among other border grounds, particularly in the Southwest and Northwest").

Tensions began building, however, prior to the 2004 petitions by China and North Korea. Although China first invested substantial sums to preserve Koguryo sites, North Korea was the first nation to petition the Committee, in 2002, to consider the sites for inscription.⁹⁹ The Selection Committee debated whether to include the sites during its 27th Committee meeting in Paris in June 2003, but ultimately deferred consideration.¹⁰⁰ Two years later, at the Twenty-Seventh Committee meeting, the Committee elected to inscribe Koguryo sites for both China and North Korea at the same time to avoid inciting political tensions.¹⁰¹ UNESCO neutrally titled the listing "Capital Cities and Tombs of the Ancient Koguryo Kingdom" in another attempt to avoid political complications by remaining as unbiased as possible.¹⁰² However, the listing was "referred to as 'China's Koguryo' . . . in the Chinese media" and the Chinese Ministry of Foreign Affairs "deleted Kuguryo from a summary of Korean history on its website."¹⁰³

South Koreans, in particular, took offense to these actions, which sparked widespread protests and editorials condemning China's actions.¹⁰⁴ In April 2004, 63% of South Korea's National Assembly considered China "their most important diplomatic partner"; a mere four months later, following the actions by China, only 6% of lawmakers held the same view.¹⁰⁵ China subsequently issued postage stamps celebrating "China's Kuguryo," which further incensed South Koreans.¹⁰⁶ The controversy over Koguryo's history sparked a debate in both Koreas about Korean identity, and the sites' listings became symbols both for distinguishing Korea from China and for unifying the

⁹⁹ Ahn, *supra* note 93.

¹⁰⁰ UNESCO, World Heritage Committee, June 30–July 5, 2003, *Decisions Adopted by the 27th Session of the World Heritage Committee in 2003*, at 109, WHC-03/27.COM/24 (Dec. 10, 2003). The Committee's decision to defer serves as an example of a procedural protection built into the nomination and selection processes. Specifically, the Committee can defer consideration in order to gather more information and wait to see how political disagreements may be resolved. *See id.* at 110 (requesting "that further steps be taken so that the relevant remaining technical issue can be resolved with a view to considering the nomination").

¹⁰¹ Ahn, *supra* note 93.

¹⁰² *See* Peter H. Gries, *The Koguryo Controversy, National Identity, and Sino-Korean Relations Today*, 22 E. ASIA 3, 3 (2005) (noting that the listing was an attempt by UNESCO to "skirt[] the issue").

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 4.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Korean nations, both of which reaffirmed China's concerns of irredentism.¹⁰⁷ North Korea's head delegate to UNESCO, Ri Ui Ha, asserted at a UNESCO meeting following the 2004 inscriptions, that "Koguryo culture is the Korean nation's common heritage, which unites our national blood vessels."¹⁰⁸

In short, the positions taken by China and the Koreas have strained China's relations with the two Koreas, while the events have brought North and South Korea closer.¹⁰⁹ Thus, actions by State Parties originating from a seemingly innocuous conservation listing substantially altered political relationships in East Asia. Since 2006, the debate has shifted to Mount Changbai/Paekdu, located in a mountain range straddling the Chinese-North Korean border and considered sacred at the time of the Koguryo kingdom.¹¹⁰

Although the Selection Committee attempted to minimize political tension by inscribing the sites for both nations at the same time and listing the sites with a neutral title, the listings have significantly shifted political relationships in a volatile region.¹¹¹ While the listings have not resulted in armed conflict, the subsequent shifts in political alliances may have important consequences for Manchuria in a post-Kim Jong-il regime in North Korea. The Manchurian province may become the center of a martial dispute between China and a unified Korean peninsula.

D. Archeological Sites in East Jerusalem

There have, however, been contested attempts at World Heritage inscription that are more similar to that surrounding the Temple of Preah Vihear than those connected to the inscription of Hiroshima or the Koguryo sites. Most notably, in February of 2001, Israel attempted to have archeological sites in East Jerusalem listed as World Heritage Sites. As a result, Palestine submitted a resolution to the UN Secretary-General asserting that Israel's attempt to have the sites inscribed on the List was an attempt to have Israeli territorial views validated by an international body in a way that would support Israel, yet

¹⁰⁷ Ahn, *supra* note 93.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See id.* (noting that since 2000, the listings of Koguryo and Mount Changbai/Paekdu have caused tensions between China and the Koreas).

circumvent independent political recognition.¹¹² After a conference the following month, the League of Arab States issued a final communiqué and adopted the Declaration of Amman, decrying “large-scale aggression being waged by the Israeli occupation forces against the Palestinians, using all modes of oppression and all types of weapons, including those internationally prohibited”¹¹³ In opposition to Israel’s attempt to have archeological sites listed, members of the League of Arab States “reaffirm[ed] their adherence to the [UN] Security Council resolutions” regarding Jerusalem “which declare null and void all measures taken, or to be taken, by Israel to change the character of this city”¹¹⁴

As discussed in Part II, the Guidelines indicate the difficulty facing Committee Members when assessing the threat of armed conflict and the harm that such conflict may pose to potential sites. It can be difficult to predict violence surrounding an inscription decision, as was the case with Preah Vihear, because there, the Thai government had initially pledged to cooperate. However, other situations are more predictable. For example, the nature and duration of the Israeli-Palestinian conflict were probably strong indicators that the inscription of certain Jerusalem sites as Israeli World Heritage Sites could act as a catalyst for violent outbreaks.

In a more prudent measure than that taken in the Preah Vihear case, the Selection Committee “postpone[d] further consideration of [the inscription of archeological sites in Jerusalem] until an agreement on the status of the City of Jerusalem in conformity with International Law [was] reached, or until the parties concerned submit[ted] a joint nomination.”¹¹⁵ Evidencing the delicacy of the situation, the UNESCO General Conference emphasized that “nothing in the present decision [to postpone consideration] shall in any way affect the

¹¹² *Report of the Special Committee*, *supra* note 5; see also Davinia Filza Abdul Aziz, *The Utility of an International Legal Approach to the Jerusalem Question: Camera Obscura or Camera Lucida?*, 7 SING. J. INT'L & COMP. L. 511, 520–21 (2003) (discussing Palestine’s use of the resolution to build on arguments that “locating the Palestinian capital in Jerusalem is integral to fulfilling the Palestinian people’s right to self-determination”).

¹¹³ See The Permanent Representative of Jordan, *Report Delivered to the Security Council and the General Assembly*, ¶ 6, U.N. Doc. A/55/892-S/2001/342 (Apr. 10, 2001) (reproducing the communiqué as an Annex to the Letter dated April 6, 2001 from the Permanent Representative of Jordan to the United Nations, addressed to the Secretary-General).

¹¹⁴ *Id.* ¶ 14.

¹¹⁵ UNESCO, World Heritage Committee, 25th Sess., June 25–30, 2001, *Report of the Rapporteur*, at 57–58, U.N. Doc. WHC-2001/CONF.205/10 (Aug. 17, 2001).

relevant United Nations resolutions and decisions, in particular the relevant Security Council resolutions on the legal status of Jerusalem,"¹¹⁶ thus addressing the concerns expressed in Palestine's resolution to the Secretary-General.

UNESCO's decision to postpone selection of the sites in Jerusalem exemplifies the procedural mechanisms by which the Committee may weigh political stability when making an inscription determination. In this case, the Committee recognized the possibility of violent consequences of the inscription of sites in Jerusalem, and urged the disputing parties to seek a resolution, either together or through international arbitration or adjudication.¹¹⁷

A fundamental problem with expecting a UNESCO resolution of the Israel-Palestine dispute over the Jerusalem sites is that the dispute is not confined to the sites themselves, but instead is symptomatic of a much larger, historical dispute. Violence between Israel and Palestine continues today, eight years after Israel attempted to have the sites listed.¹¹⁸ The magnitude of the dispute resolution needed in this situation far exceeds the scope of the UNESCO World Heritage Convention and Guidelines. These documents were intended to protect sites of cultural and natural importance, not bring peace to war zones. Consequently, expecting those documents and procedures to resolve such a dispute is unrealistic.

An important question to consider is, why did the Committee decide to postpone consideration of the Jerusalem sites, but decide to immediately inscribe Preah Vihear? The two cases are similar in that both disputes involve longstanding conflicts over sites of religious and cultural importance between peoples that have historically been at odds with each other.

There are, however, important differences between these two cases which may explain why the Committee decided them differently. First, an international court determined that Preah Vihear was Cambodian property, whereas there is no analogous decision regarding claims to Jerusalem and the West Bank.¹¹⁹ Second, the dispute between Thailand and Cambodia has largely

¹¹⁶ UNESCO.org, Jerusalem, <http://whc.unesco.org/en/tentativelists/1483> (last visited Nov. 9, 2009).

¹¹⁷ See *Report of the Rapporteur*, *supra* note 115, at 57 (requiring an agreement "in conformity with International Law").

¹¹⁸ Taghreed El-Khodary & Isabel Kershner, *Israeli Shells Kill 40 at Gaza U.N. School*, N.Y. TIMES, Jan. 7, 2009, at A12.

¹¹⁹ Specifically, the International Court of Justice opinion provided the Selection Committee

been a regional problem, whereas the Israeli-Palestinian dispute involves various international actors. The Quartet on the Middle East, the body charged with mediating Israeli-Palestinian negotiations, includes the United States, Russia, the European Union, and the United Nations.¹²⁰ The violent conflict between Thailand and Cambodia over Preah Vihear is a recent development, and is limited to those two countries. Third, at the time Cambodia petitioned UNESCO, Thai Foreign Minister Pattama had signed a joint communiqué signaling an intent to cooperate with Cambodia to have Preah Vihear listed as a Cambodian site,¹²¹ whereas the League of Arab States issued a resolution protesting Israel's petition shortly after it was filed. All of these differences may have factored into the Selection Committee's decisions to inscribe Preah Vihear and yet postpone consideration of the Jerusalem sites.

E. Virunga National Park: Democratic Republic of Congo

Not only are culturally important sites threatened by armed conflict, but important sites of biodiversity are also under siege. For example, certain species inhabiting Virunga National Park in the Democratic Republic of Congo (DRC) are threatened due to "[t]he escalation of violence" in the area.¹²² Specifically, the park "provides the habitat for the last populations of mountain gorillas," and this habitat is "threatened by . . . persistent shooting."¹²³

In response to the situation, UNESCO established a conservation project in 2000 called "Biodiversity Conservation in Regions of Armed Conflict: Protecting World Heritage in the Democratic Republic of the Congo."¹²⁴ The

with an independent legal basis for awarding World Heritage status to Preah Vihear as a Cambodian site.

¹²⁰ Press Release, Middle East Quartet, Statement by Middle East Quartet, U.N. Doc. SG/2091 (Sept. 23, 2004).

¹²¹ The Selection Committee explicitly relied on this joint communiqué when deciding to inscribe Preah Vihear as a Cambodian site. UNESCO, World Heritage Committee, 32d Sess., Quebec City, Can., July 2–10, 2008, *Decisions Adopted at the 32nd Session of the World Heritage Committee*, at 221, U.N. Doc. WHC-08/32.COM/24Rev (Mar. 31, 2009).

¹²² Press Release, UNESCO, Declaration by the UNESCO Director General Concerning Virunga National Park, World Heritage Site (Oct. 30, 2008) [hereinafter UNESCO Press Release on Virunga National Park], available at http://portal.unesco.org/en.php-URL_ID=43814&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹²³ UNESCO Press Release on Virunga National Park, *supra* note 122.

¹²⁴ UNESCO.org, Biodiversity Conservation in Regions of Armed Conflict: Protecting World Heritage in the Democratic Republic of the Congo, <http://whc.unesco.org/en/activities/83/> (last

project's goal is to "ensure the conservation of World Heritage Sites in the DRC both during periods of civil unrest and the long term, by mobilizing financial, logistical, technical and diplomatic support at the regional and international levels" ¹²⁵ Moreover, the project is supposed to serve as a long-term "learning process to inform efforts and develop mechanisms to conserve similar[ly threatened] sites" ¹²⁶

Virunga National Park differs from the aforementioned cases in two important ways. First, the Selection Committee inscribed Virunga National Park based on its biodiversity and natural importance as opposed to cultural or historical importance. ¹²⁷ Second, Virunga National Park was selected as a World Heritage Site prior to the current threat of armed conflict, whereas controversy over Preah Vihear, Hiroshima, Koguryo, and Jerusalem surrounded the inscription process itself.

While the Virunga project is an ex post conservation measure, as opposed to an ex ante dispute-resolution tool, it may still offer guidance in shaping changes to UNESCO's selection documents to account for political instability surrounding site-selection considerations. Specifically, one of the project's primary aims is to use "diplomatic interventions to convince leaders and others [sic] authorities in all concerned States of the need to ensure the security of the working environment and for the conservation [sic] personnel and equipment." ¹²⁸ Similar diplomatic interventions could prove useful in encouraging other nations to issue joint resolutions for World Heritage consideration. The inclusion of diplomatic intervention tools is just one of many changes that could be made to UNESCO's guiding documents; other possible changes are discussed below.

IV. PROPOSED CHANGES TO THE OPERATIONAL GUIDELINES IN ACCORDANCE WITH THE WORLD HERITAGE CONVENTION

As noted in Part II, the Guidelines do not explicitly require the Selection Committee to consider any political discord surrounding proposed site

visited Nov. 9, 2009).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See UNESCO Press Release on Virunga National Park, *supra* note 122 (noting that the park "comprises an outstanding diversity of habitats").

¹²⁸ Biodiversity Conservation in Regions of Armed Conflict, *supra* note 124.

inscription. However, the Guidelines do instruct Committee members to carefully consider potential sites exposed to dangerous conditions, as well as allow for inclusion on the World Heritage in Danger List, which provides access to the World Heritage Fund.¹²⁹

In practical terms, the protections inherent in the nomination and selection processes provide the most substantive mechanisms by which Committee members may evaluate political instability. The cases of Preah Vihear and the sites in Jerusalem serve as instructive examples of how Committee members may employ these procedural safeguards. For example, the nomination criteria require notice in that a State Party must include the potential sites on its tentative list, thus indicating its belief in sovereignty over the site in question.¹³⁰ In all of the above examples, the State Party petitioning for inscription listed the site in question on its tentative list, thus providing notice to all other parties and giving those parties an opportunity to object prior to inscription. For example, when Israel petitioned to have the sites in Jerusalem inscribed, Palestine quickly protested. In the case of Jerusalem, the Committee demonstrated how the postponement option could allow for more prudent decision making. Further, Cambodia's nomination file should have put Thailand on alert because it contained the 1907 map with the incorrect watershed demarcations that placed the Temple on Cambodian soil.

Based on the armed-conflict factor of the World Heritage in Danger List and the Committee's use of procedural safeguards to try to make judicious inscription decisions in the cases of Preah Vihear, Koguryo, and Jerusalem, it appears that UNESCO members intend to make decisions that will not result in political discord. For example, in the Koguryo case, the Committee tried to strike a middle ground by jointly inscribing sites and inscribing those sites under neutral names. Conflict persisted when the nations involved used the inscriptions as propaganda to stoke nationalist sentiments. However, when the Committee decides to inscribe a site, it tries to do so in a way that will minimize controversy.

Because the reasoning behind the decisions in those cases was left largely undocumented, little guidance is provided for future cases. Instead, explicit

¹²⁹ World Heritage in Danger, *supra* note 29. But, providing access to the World Heritage Fund may actually be counterproductive in instances of armed conflict if the government receiving these funds uses the assistance funds to finance the conflict. UNESCO and UN oversight must ensure that funds are not used to finance war but to conserve endangered sights.

¹³⁰ World Heritage List Nominations, *supra* note 31.

directions in the Guidelines for documenting the reasoning behind listing decisions could remedy this inadequacy. For example, the Guidelines could require Committee members to draft an opinion, analogous to a judicial opinion illustrating the reasoning behind a judge's ruling, which would state the reason a site was listed and provide precedent for future cases.

Based on the Committee's decisions in the aforementioned case studies, several guiding principles can be divined. First, notice is of critical importance. While it should be obvious that a country considers that it has sovereign control over a site it has included on its tentative list, the Guidelines should include formal language indicating as much to potential objectors in the absence of a co-operational joint petition or where the petitioning nation indicates otherwise. Such formal language would preclude a potential objector from arguing that it did not have notice. The petitioning state's actions, in conjunction with the explicit language in the Guidelines, would provide a legal basis for denying a hearing to an objector based on lack of notice. Such language would result in greater vigilance of states in regards to the inclusion of sites on tentative lists. This vigilance at an early stage would hopefully result in peaceful protest and resolution before violence could result.

Second, Committee members should directly consider any independent legal support for inscription of sites as belonging to a particular nation. Such an independent legal basis would weigh in favor of a site being listed. When deciding to inscribe Preah Vihear as a Cambodian site, the Committee found support in the ICJ's 1962 decision. There was no analogous decision supporting Israel's petition and such an absence of precedent, in conjunction with other factors, may have contributed to the Committee's decision to postpone inscription. There was also no independent legal support regarding Koguryo, but the parties in that case decided to have the sites jointly inscribed. The Guidelines should include language indicating that the Committee will take independent legal support into consideration when making inscription decisions.

Independent legal support is important because it provides a third-party assessment of the conflict in a court where concerned states submit to its jurisdiction. Because the parties submit to jurisdiction in a particular case, it would only be fair to honor the outcome of that decision. More specifically, cases like *Temple of Preah Vihear* are important because they obviate the need for subsequent, alternate dispute resolution unless circumstances have substantially changed. This would save UNESCO time and money by freeing

it from mediating or conducting hearings in cases where an independent legal decision already exists. However, binding the states to an ICJ decision, or that of another court, could have the adverse, unintended effect of disincentivizing states from seeking resolution in those courts in the first place.

Third, as discussed in Part III, general legal principles such as laches and estoppel have implicitly guided Committee decisions in the past. Language in the governing documents should therefore explicitly indicate that such generally accepted norms will inform Committee decisions. Put differently, because the Committee relies on legal determinations made by courts that rule based on general principles of international law, the Committee is already, albeit indirectly, basing its decisions on the same principles. For example, the principle of custom is generally accepted in courts of international law, such as the ICJ, and the Committee in turn relies on judgments by those courts. Custom is a generally accepted source of international law and requires both general practice *and* its acceptance as international law.¹³¹ If ICJ decisions would explicitly inform Committee decisions, then it follows that principles, such as custom, which guide international court decisions,¹³² should also inform Committee decisions. If this is true, then language indicating as much should be explicitly included in the Guidelines so that states do not have to do the guess-work.

Fourth, expressions of commitment to cooperate should weigh in favor of inscription, as opposed to postponement of such a decision. In the Preah Vihear case, Thailand had signed a joint communiqué indicating its willingness to cooperate with Cambodia in having the Temple inscribed. Even though Thailand later retracted that commitment, at the time the Committee was making its decision, it was under the impression that Thailand was willing to cooperate. While there was no previous indication of cooperation between China and the Koreans regarding Koguryo, the nations' willingness to have the sites jointly inscribed indicated a willingness to cooperate. Conversely, there was no such commitment between Israel and Palestine and the Committee consequently postponed inscription until a consensus between Israel and Palestine could be reached. Again, while it should be obvious, the Guidelines

¹³¹ LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 59 (4th ed. West Group 2001) (1980).

¹³² *See, e.g., S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (demonstrating the use of custom in international courts).

should include language that once a State Party has demonstrated an intent to cooperate with an inscription, barring unforeseen or extraordinary circumstances, that party cannot later protest the inscription.

However, the parties would still have obligations to cooperating nations once a site had been listed. Specifically, once a State Party has demonstrated an intent to cooperate, particularly in cases of joint inscription, parties should be precluded from using that inscription as a way to provoke the joint inscriber(s), as China did when it ignored the Koguryo's neutral listing name and referred to the sites in a self-serving way at the expense of the Koreans. By doing so, China undermined the Committee's deliberate efforts to minimize controversy in East Asia. Consequently, the Guidelines ought to include requirements prohibiting such conduct.

For example, the Guidelines could include penalties for acting as China did. However, such penalties probably would not be realistic because of the need for an international watchdog to determine whether there was a breach and then enforce the chosen penalty. In most cases, the costs of such enforcement would likely outweigh any benefits. Such preclusion might exacerbate existing tensions between state sovereignty and common heritage inherent in the concept of a World Heritage Site.¹³³

While the Committee's decisions seem to have been based, in part, on four general principles—notice, independent legal support, general principles of international law, and expressions of commitment—the explicit inclusion of these principles in the Guidelines would likely be insufficient to remedy political strife resulting from controversial inscriptions. This is because, while notice does prevent nations from pleading ignorance after an altercation has occurred, notice alone may not deter nations from violent conflict in the first place. Thus, other safeguards should be implemented to protect endangered, potential World Heritage Sites before nations resort to armed conflict.

UNESCO has begun to experiment with independent bodies and diplomatic responses to environmental-conservation crises that could serve as models to develop other bodies to protect culturally important sites threatened by conflict. For example, the diplomatic bodies and procedures used to protect Virunga

¹³³ A common critique of the Convention is that it protects common heritage at the expense of state sovereignty. *See, e.g.,* Affolder, *supra* note 2, at 342 ("The Convention is marked by unresolved tension between state sovereignty and the recognition that certain structures, sites and areas constitute the heritage not just of individual nations, but of humankind.").

National Park, a site of environmental importance, could be used as a model to create a similar body to protect sites of cultural importance.

One of the Virunga Park Project's primary aims is to use diplomatic intervention to achieve conservation goals. Specifically, the group is to "[w]rite appeals and organize diplomatic missions by high level UN officials and/or other leading international and African personalities to relevant governments"¹³⁴ At a local level, the group is to "[l]iaise with military and rebel authorities to facilitate continuation of conservation activities"¹³⁵ While such diplomatic tactics are not revolutionary, the Committee reported early success with the tactics,¹³⁶ and similarly adapted tactics could be useful in diffusing situations like that at Preah Vihear.

In short, the Virunga National Park project is a comprehensive approach to protect a World Heritage Site under siege. The Virunga problem differs importantly from the disputes previously examined in that those controversies surrounded the inscription process itself. Consequently, while lessons can be learned from the Virunga project, a more narrowly tailored, independent dispute-resolution board could be created to evaluate cases for potential political unrest and to mediate disagreements between nations prior to inscription. While several independent bodies evaluate nomination files and offer recommendations to the Committee,¹³⁷ those bodies only determine whether the sites in question are sufficiently important, historically or culturally, to merit such protection. They do not consider current political contexts.

A body independent from the World Heritage Committee could be created for three primary purposes: to evaluate political discord between interested parties, to hear grievances from interested parties, and to make formal recommendations to the Committee to deny, postpone, or grant inscriptions. The goal of this body would be to serve as an *ex ante* dispute-resolution tool intended to quell arguments before violent conflict could result. First, the body

¹³⁴ UNESCO, World Heritage Committee, 25th Sess., Helsinki, Fin., Dec. 11-16, 2001, *Progress Report on the UNESCO/DRC/UNFIP Project 243ZAI70*, ¶ 3.2.1., U.N. Doc. WHC-01/CONF.208/INF.4.

¹³⁵ *Id.* ¶ 3.2.3.

¹³⁶ *See id.* at 25 (noting that "[i]nternational and diplomatic support is the sphere of activity that has begun implementation fastest").

¹³⁷ Most notable are the International Council on Monuments and Sites and the World Conservation Union, discussed above.

could independently evaluate the political situation surrounding the site in question. It could hear testimony from experts and consider other evidence on, among other considerations, the history of the dispute and the degree of threat faced by the site. After conducting such inquiries, the body could hear testimony from representatives of the interested nations.

The composition of the body would be integral to its objective hearing capacity. The body could be composed of members from neutral State Parties as well as those parties involved in the dispute. This would require representatives from concerned states to discuss the situation diplomatically. However, given such a composition, hearings could devolve into political posturing and finger-pointing.

Consequently, it may be more prudent to have the body composed entirely of neutral state representatives and allow interested state representatives to petition the body. In this respect, the body would resemble an arbitration or mediation committee. Hearings conducted by such a body would consolidate the interested parties' motions, as opposed to the periodic complaints that are currently issued directly to the Committee. Moreover, this independent body would be more responsive because it could rule on hearings on a rolling basis, whereas the Committee would have to postpone a decision until a World Heritage Committee meeting.

After hearing evidence and arguments, the independent body would make recommendations to the Committee on whether the site in question should be listed. Such a recommendation would provide another independent basis for the Committee's decision and would serve to formalize the Committee's decision as to whether to grant, postpone, or deny an inscription request.

V. CONCLUSION

It is not controverted that certain places and structures are so culturally, historically, or environmentally important that they should be cherished and protected for future generations. However, when this sentiment is considered in light of local controversies, then the issue of *how* to protect those sites can become extremely contentious. Particularly when multiple nations or peoples lay claim to the same site, the political, cultural, and religious realities can thwart the laudable goals of world heritage conservation. Bickering can trivialize the cultural, historical, or environmental importance of a site and

threaten that site's very existence. Thus, the need to protect a disputed site becomes all the more urgent.

In the vast majority of cases, the UNESCO World Heritage Convention and the Operational Guidelines function exactly as they are intended. However, sites of disputed legacy or sovereignty are often those most in need of protection, and UNESCO documents and procedures could be better adapted to that end.

Basic political posturing with respect to listings—as seen in the Hiroshima case—is largely innocuous, expected, and probably ineradicable. Some disputes—like that between Israel and Palestine over sites in Jerusalem—are part of much larger disputes beyond UNESCO's intended scope. In other cases—like that involving the Koguryo sites—UNESCO documents and procedure seem to function as intended; however, acts by parties following inscription undermine the purposes underlying World Heritage listing and importantly alter regional alliances. The Preah Vihear case most loudly demands the need for revisions and additions to World Heritage documents as to what sources and actions should inform Committee decisions. It also highlights the need to form a body to evaluate political discord between the interested parties, and to make formal recommendations to the Committee to deny, postpone, or grant inscriptions.

The Committee's decision on Preah Vihear seemed uncontroversial at the time based on the ICJ decision and the joint communiqué. However, the fact that the joint communiqué was struck down by Thailand's high court on the day of the inscription, and that Thailand erupted in protest and riots, indicated a much more complex picture. The border war that erupted shortly thereafter indicates the need for a more cautious approach to potentially inflammatory listings.

The recommendations offered in this Note are neither drastic nor complex. UNESCO should explicitly include certain factors—notice, independent legal support, general principles of international law, and expressions of commitment—that guide Committee decisions and should offer reasoning for those decisions. This is not likely to curb political disagreement surrounding the site-selection process. It will, however, preclude objecting parties from pleading ignorance and force those parties to consider how their actions would be considered during a site-selection evaluation. Similarly, parties will likely continue to bicker despite the existence of a body intended to evaluate political context, hear disputes, and offer a recommendation based on that hearing.

However, the hope is that if the parties are provided with a forum for peaceable resolution, they will not resort to armed conflict as they did at Preah Vihear.

There will never be consensus surrounding World Heritage inscriptions, but UNESCO should seek to do all that it can to minimize conflict, protect human life, and preserve the world's greatest monuments to human achievement and natural creation for untold generations to come—a true heritage for the world.

