

CULTURAL HERITAGE PROTECTION AND  
SACRED SPACES: CONSIDERING  
ALTERNATIVE APPROACHES FROM WITHIN  
THE HUMAN RIGHTS FRAMEWORK

Leonard Hammer\*

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INTRODUCTION

In many respects, the international system fails to protect cultural heritage. Both in times of warfare and civil strife<sup>1</sup> and in times of peace,<sup>2</sup> existing avenues for cultural heritage protection do not always succeed at preserving important cultural heritage sites. Even

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\* Leonard Hammer (B.A., J.D., LL.M., Ph.D) lectures at Hebrew University, Israel, and University of Arizona, United States.

1. See, e.g., Sandra Auger, *Palmyra: Before and After ISIS*, REUTERS (Apr. 1, 2016), <http://www.reuters.com/news/picture/palmyra-before-and-after-isis?articleId=USRTSCQPG> (contrasting pictures of Palmyra’s spiritual and cultural heritage sites before and after ISIS occupation).

2. See, e.g., Press Release, UNESCO World Heritage Ctr., Dresden Is Deleted from UNESCO’s World Heritage List (June 25, 2009), <http://whc.unesco.org/en/news/522/> (announcing and explaining the removal of Germany’s Dresden Elbe Valley from UNESCO’s World Heritage List).

when the international community seeks to protect cultural heritage through judicial oversight, the effort is usually *ex post facto* and thus too late to actually preserve the destroyed cultural heritage.<sup>3</sup> Looking outside of the conflict framework, where the challenges to cultural heritage protection are compounded by military necessity<sup>4</sup> and the involvement of non-state actors who might not feel bound by international obligations,<sup>5</sup> cultural heritage protection remains problematic. The key problems facing cultural heritage protection include: disagreement about the meaning of cultural property and which sites merit protection, lack of enforcement mechanisms to uphold treaties surrounding cultural heritage protection, and political discourse within the bodies charged with protecting cultural heritage.<sup>6</sup>

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3. For the International Criminal Court, see, e.g., *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, ¶¶ 10–11 (Sept. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF) (charging defendants with, *inter alia*, intentionally directing attacks against protected Muslim shrines); *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Case Information Sheet (Aug. 17, 2017), <https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf> (describing defendant's sentence, which included, *inter alia*, reparations for the destruction of religious and historic buildings). For the International Criminal Tribunal for the Former Yugoslavia, see, e.g., *Prosecutor v. Kordic*, IT-95-14/2-A, Appeals Judgment, ¶ 85 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004), [http://www.icty.org/x/cases/kordic\\_cerkez/acjug/en/cer-aj041217e.pdf](http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf) (finding accused guilty of "[t]he seizure of destruction or willful damage done to institutions" dedicated to religion and education); *Prosecutor v. Brdanin*, IT-99-36-T, Judgment, ¶ 594 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004), <http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf> (charging defendant with "[t]he seizure of, destruction or wilful damage done to institutions" dedicated to religion); *Prosecutor v. Stakić*, IT-97-24-T, Judgment, ¶ 296 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003), <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf> (alleging that defendant "participated in persecutorial destructions of Bosnian Muslim and Bosnian Croat religious and cultural buildings"); *Prosecutor v. Naletilic*, IT-98-34-T, Judgment, ¶ 605 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003), [http://www.icty.org/x/cases/naletilic\\_martinovic/tjug/en/nal-tj030331-e.pdf](http://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf) (stating that "a crime under Article 3(d) of the Statute has been committed when . . . the destruction regards an institution dedicated to religion").

4. See, e.g., Craig J. S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CAL. W. INT'L L.J. 177, 178 n.4 (2007) (discussing Iraqi use of cultural objects to shield military hardware).

5. See, e.g., Akram Ijla, *The Destruction of Memory: Lost Cultural Heritage in Gaza*, THIS WEEK IN PALESTINE 26 (June 30, 2017), <http://thisweekinpalestine.com/wp-content/uploads/2017/06/The-Destruction-of-Memory.pdf> (discussing the ongoing destruction of cultural heritage in Gaza, such as the ancient city and port of Anthedon, under Hamas rule).

6. For recent critiques of cultural heritage protection, see Lynn Meskell, *State of Conservation: Protection, Politics, and Pacting Within UNESCO's World*

Challenges to cultural heritage protection are exacerbated considering that sacred spaces might not solely be a focus for preservation, but also include notions of use and protection given the spiritual significance of the site itself.<sup>7</sup> Sacred space protection not only aims to preserve cultural property for the welfare of humankind writ large, but also considers the use of such space for religious practices or pilgrimages and seeks to ensure the preservation of a holy site on behalf of a particular group given its spiritual connection to a space.<sup>8</sup>

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*Heritage Committee*, 87 ANTHROPOLOGICAL Q. 217, 217 (2014) (arguing that “as the rush for World Heritage inscription increases . . . the resources . . . for conservation of sites already inscribed potentially declines”); Christoph Brumann, *Shifting Tides of World-Making in the UNESCO World Heritage Convention: Cosmopolitanisms Colliding*, 37 ETHNIC & RACIAL STUD. 2176, 2177 (2014) (finding that World Heritage sites have shifted from a venture in co-ownership of sites by “humanity” to a co-owned “right of nation states to have their candidates listed, even against conservation-related concerns”); Dennis Rodwell, *The UNESCO World Heritage Convention, 1972–2012: Reflections and Directions*, 3 HIST. ENV’T.: POL’Y & PRAC. 64, 83 (2012) (suggesting that the original vision of the World Heritage Convention has been sidelined as the Convention “appears focused on the branding of individual sites rather than collective issues of protection and conservation”).

7. See, e.g., Silvio Ferrari, *Introduction: The Legal Protection of the Sacred Places of the Mediterranean*, in BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE: LEGAL AND RELIGIOUS PERSPECTIVES ON THE SACRED PLACES OF THE MEDITERRANEAN 10 (Silvio Ferrari & Andrea Benzo eds., 2014) (discussing the importance of being able to use a site for religious practice, in addition to preserving it).

8. Part of the hesitation to actually define sacred space in the international human rights context derives from the broader problems associated with sacred space, including conflicts between religious groups over the same space or conflicts between such groups and the state. See Peter Petkoff, *Finding a Grammar of Consent for ‘Soft Law’ Guidelines on Sacred Places: The Legal Protection of Sacred Places within the Existing Public International Law Instruments and Grass-Root Approaches*, in BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE, *supra* note 7, at 58–60 (describing various difficulties with attempts to develop a taxonomy of sacred spaces and the legal difficulties that these challenges often trigger); see also INT’L UNION FOR CONSERVATION OF NATURE, SACRED NATURAL SITES: GUIDELINES FOR PROTECTED AREA MANAGERS 43–47 (Robert Wild & Christopher McLeod eds., 2008), [http://cmsdata.iucn.org/downloads/pa\\_guidelines\\_016\\_sacred\\_natural\\_sites.pdf](http://cmsdata.iucn.org/downloads/pa_guidelines_016_sacred_natural_sites.pdf) (defining sacred space in a rather broad and somewhat amorphous fashion as “an area of special spiritual significance to peoples and communities”).

Note that the recognition of a spiritual side to a holy site as a distinguishing factor from a cultural heritage site does not negate the political overlay nor potential political use that might be made by a particular group in asserting the importance of a holy site. See, e.g., Roger Friedland & Richard D. Hecht, *The Powers of Place*, in RELIGION, VIOLENCE, MEMORY, AND PLACE 17 (Oren Baruch Stier & J. Shawn Landres eds., 2006) (considering the case of Jerusalem and the political conflict between Palestinians and Israelis); Avi Sasson, *From Unknown Saint to*

The unique nature of sacred space further suggests that it merits some form of international protection beyond what is available under the current cultural heritage regime.<sup>9</sup>

In light of these differences between cultural heritage space, sacred space, and holy places, what are the potential avenues for sacred space protection under the current international normative framework? What normative framework outside of cultural heritage protection might serve the interests of groups desiring to permanently protect sacred space? Have there been any alterations or expansions of the scope and meaning of specific international human rights that might also allow for inclusion of sacred space protection?

This Article will analyze potential sources for sacred space protection under the cultural heritage protection regime, noting some of the problems created by the current framework and the challenges they present for sacred space protection. The Article will then offer a potential source for protection of sacred spaces based on the international human right to freedom of religion or belief, pursuant to the current interpretation accorded to the right.<sup>10</sup> Previous attempts to use the freedom of religion to protect sacred space have relied on the right when the use of the sacred space is part of a mandated and necessarily manifested religious act<sup>11</sup> or when the sacred site is used

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*State Site: The Jewish Dimension in The Sanctification Process of Tombs in The State of Israel*, in SACRED SPACE IN ISRAEL AND PALESTINE: RELIGION AND POLITICS 82 (Marshall J. Breger, Yitzhak Reiter & Leonard Hammer eds., 2012) (discussing the renewed movement of pilgrims to the tombs of holy men and its intersection with the altered political processes). On the other hand, recognizing the political dimensions does not detract from the fact that a holy site might still merit protection and be a place of worship or veneration by a religious group.

9. Umberto Leanza, *General Problems of International Law Concerning Sacred Places*, in BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE, *supra* note 7, at 37.

10. The author is mindful that there are other potential avenues for sacred space protection under existing international human rights norms, such as minority and indigenous people's rights or the right to property. *See, e.g.*, Petkoff, *supra* note 8, at 63, 66–67; Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1063–66 (2005) (asserting that a right to property basis, as opposed to freedom of religion grounds, can better serve the interests of Native Americans when defending tribal sacred sites).

11. *See, e.g.*, Gideon Sapir & Daniel Statman, *The Protection of Holy Places*, 10 L. & ETHICS HUM. RTS. 135, 137 (2016) (questioning whether religious freedom actually protects religious spaces and concluding that protection is gained only when believers can demonstrate why their interests should overcome the interests of the general public); Peter W. Edge, *Hard Law and Soft Power: Counter-terrorism, the Power of Sacred Places, and the Establishment of an Anglican Islam*, 11

by indigenous peoples.<sup>12</sup> The interpretation of the right to freedom of religion or belief in this Article embraces an emerging group approach that includes indigenous people and centers on defining the contours of a belief. It also reflects broader understandings emerging in international human rights bodies and tribunals.

The Article also will incorporate into its analysis a social constructivist approach to human rights, whereby the socialization process of human rights may encourage reliance on the human right to freedom of religion or belief as a potential ground for long-term sacred space protection. Reliance on freedom of religion, as opposed to cultural heritage protection, provides a relevant and conceptually-aligned basis for sacred space protection that better encapsulates the interests and meaning of necessary protection.<sup>13</sup>

## I. THE WORLD HERITAGE CONVENTION

Considering cultural heritage protection as a potential source for sacred space protection merits a look at the existing international framework for cultural heritage protection. The key identified problems associated with cultural heritage protection (and with sacred space protection within this framework) are the definition accorded to

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RUTGERS J.L. & RELIGION 358, 359–60 (2010) (describing the United Kingdom's consideration of formal legal regulations of Islamic spaces after the July 2005 terrorist attacks in London).

12. See, e.g., Alex T. Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 270–75 (2012) (discussing the protection of Native American sacred sites in the wake of the passing of the Religious Freedom Restoration Act); Khett B. Larson, *Holy Water and Human Rights: Indigenous Peoples' Religious-Rights Claims to Water Resources*, 2 ARIZ. J. ENVTL. L. & POL'Y 81, 83–86 (2011) (discussing indigenous peoples' rights to water in the context of its role in sacred and ceremonial contexts); Peter J. Gardner, *Dedication to the Small Town Attorney: The First Amendment's Unfulfilled Promise in Protecting Native American Sacred Sites: Is the National Historic Preservation Act a Better Alternative?*, 47 S.D. L. REV. 68, 79–82 (2002) (arguing that the National Historic Preservation Act coupled with developing ties with other preservationist groups, presents a preferable alternative to the First Amendment in preserving sacred Native American sites).

13. The Article is not entirely discounting the naming and shaming approach used, for example, by the World Heritage Committee (Committee). See, e.g., Sam Litton, *The World Heritage "In Danger" Listing as a Taking*, 44 NYU J. INT'L. L. & POL'Y 219, 228–33 (2011) (discussing the use of the "List of World Heritage In Danger" as one of the available forms of naming and shaming by the Committee). Rather, this Article is offering an avenue for bolstering protection claims. Using both approaches can certainly help achieve the desired socialization of the norm, namely to protect sacred space (and by extension, cultural heritage sites as well).

the term “cultural heritage” and the lack of enforcement mechanisms for protecting cultural heritage property. By contrast, international treaties’ terms accord an open-ended meaning to the human right to freedom of religion<sup>14</sup> and create different tribunals in which a state may be challenged for violating a human right.<sup>15</sup>

The World Heritage Convention (WHC) is a central document to cultural heritage and sacred space protection.<sup>16</sup> The WHC was crafted as the premier document delineating protection of world cultural heritage sites that possess “outstanding universal value.”<sup>17</sup> The Preamble to the WHC explicitly states that cultural heritage of outstanding interest “need[s] to be preserved as part of the world heritage of mankind as a whole” and that disappearance of cultural heritage constitutes a “harmful impoverishment of the heritage of all the nations of the world.”<sup>18</sup> It goes on to define cultural heritage as including “monuments . . . which are of outstanding universal value from the point of view of history, art or science.”<sup>19</sup>

14. See, e.g., HEINER BIELEFELDT ET AL., FREEDOM OF RELIGION OR BELIEF: AN INTERNATIONAL LAW COMMENTARY 92 (2016) (delineating several broad international standards defining the right to manifest one’s religion or belief); Arcot Krishnaswami (Special Rapporteur of the Sub-Commission On Prevention of Discrimination and Protection of Minorities), *Study of Discrimination in the Matter of Religious Rights and Practice*, at 17, U.N. DOC. E/CN.4/Sub.2/200/Rev.1 (1960) (calling for a broad understanding of “manifestation” of a religion or belief).

15. See, e.g., BRANDEIS INST. FOR INT’L JUDGES, THE EXPANDING IMPACT OF HUMAN RIGHTS LAW ON INTERNATIONAL COURTS AND TRIBUNALS (2013), [https://www.brandeis.edu/ethics/pdfs/internationaljustice/bijj/Expanding\\_Impact\\_2013.pdf](https://www.brandeis.edu/ethics/pdfs/internationaljustice/bijj/Expanding_Impact_2013.pdf) (providing an overview of the various international tribunals that have been established to allow for challenges against states for human rights violations).

16. See generally UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, *adopted* Nov. 16, 1972, art. 4, 1037 U.N.T.S. 151 (entered into force Dec. 17, 1975) [hereinafter World Heritage Convention], <http://whc.unesco.org/archive/convention-en.pdf> (providing that each party “recognizes . . . the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of . . . cultural . . . heritage”).

17. See generally Intergovernmental Comm. for the Prot. of the World Cultural & Nat. Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention*, at 49–53, U.N. DOC. WHC.15/01 (July 8, 2015) [hereinafter Operational Guidelines 2015], <http://whc.unesco.org/en/guidelines/> (detailing criteria for listing a site as a world heritage property which essentially define the meaning of “outstanding universal value”).

18. World Heritage Convention, *supra* note 16.

19. *Id.* art. 1 (describing monuments as articles of “cultural heritage” that include “architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point

The WHC employs a delicate balancing act that defers to state parties to designate sites for preservation,<sup>20</sup> while recognizing the role of the international community at large.<sup>21</sup> Article 13(1), for example, provides:

The World Heritage Committee shall receive and study requests for international assistance formulated by States Parties to this Convention with respect to property forming part of the cultural or natural heritage, situated in their territories, and included or potentially suitable for inclusion in the lists mentioned referred to in paragraphs 2 and 4 of Article 11. The purpose of such requests may be to secure the protection, conservation, presentation or rehabilitation of such property.<sup>22</sup>

The Article continues in Clause 13(7) to provide that:

The Committee shall co-operate with international and national governmental and non-governmental organizations having objectives similar to those of this Convention. For the implementation of its programmes and projects, the Committee may call on such organizations, particularly the International Centre for the Study of the Preservation and Restoration of Cultural Property (the Rome Centre), the International Council of Monuments and Sites (ICOMOS) and the International Union for Conservation of Nature and Natural Resources (IUCN), as well as on public and private bodies and individuals.<sup>23</sup>

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of view of history, art or science”); *see also* Operational Guidelines 2015, *supra* note 17, ¶ 49 (defining an object of cultural significance as “so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity”).

20. World Heritage Convention, *supra* note 16, art. 5; *see also* Sarah Eagen, *Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws that Support International Action*, 13 PACE INT’L. L. REV. 407, 443 (2001) (noting one of the key weaknesses of the Convention: that source nations might not have any connection or interest in a particular cultural property, thereby undermining the very reason for developing some form of cultural preservation of common heritage objects).

21. *See* Stefano Battini, *The Procedural Side of Legal Globalization: The Case of the World Heritage Convention*, 9 INT’L J. CONST. L. 340, 350 (2011) (stating that the “conceptual scheme” of the World Heritage Convention “entrusts each state party with a global function” and requires that “[e]ach state . . . manage a ‘world heritage’”).

22. World Heritage Convention, *supra* note 16, art. 13.

23. *Id.* arts. 6–7 (calling for international cooperation in assisting state parties to “conserve and identify that heritage”); *see also* Ana F. Vrdoljak, *World*

The WHC charges the World Heritage Committee (Committee) with implementing the Convention's overarching objectives.<sup>24</sup> The Committee acts as the secretariat for the application of the World Heritage Convention, monitoring UNESCO instruments such as declarations (that create moral and political commitments), recommendations (that encourage states to adopt a specific heritage approach), and conventions (that legally bind state parties).<sup>25</sup> The state—along with the international community—is obliged to protect, conserve, and provide such sites with maximum resources.<sup>26</sup> The Committee issues periodic reports based on information submitted by states.<sup>27</sup> Reports provide an opportunity for the Committee to dialogue with states and monitor sites.<sup>28</sup> The Committee may issue additional reports for sites considered by the Committee to be at high risk.<sup>29</sup>

## II.. CULTURAL HERITAGE

The WHC has been interpreted to prioritize not just cultural property per se,<sup>30</sup> but also all forms of cultural heritage beyond monuments and building sites.<sup>31</sup> Cultural heritage is part of a dynamic social process, subject to constant alteration as values shift and

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*Heritage Committee and International Assistance*, in THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 219, 228 (Francesco Francioni ed., 2008) (interpreting Article 6 as providing grounds for unilateral action by the WHC).

24. World Heritage Convention, *supra* note 16, art. 11.

25. See, e.g., Intergovernmental Comm. for the Prot. of the World Cultural & Nat. Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention*, ¶ 24, U.N. DOC. WHC.08/01 (Jan. 2008) [hereinafter *Operational Guidelines 2008*] (explaining the main functions of the Committee, which include monitoring UNESCO instruments).

26. World Heritage Convention, *supra* note 16, art. 4; see also *id.* art. 5 (providing additional steps to be taken by the state).

27. *Operational Guidelines 2008*, *supra* note 25, ¶¶ 199–202.

28. *Id.*

29. *Id.*

30. But see Convention for the Protection of Cultural Property in the Event of Armed Conflict, *opened for signature* May 14, 1954, art. 4, 249 U.N.T.S. 240 (entered into force Aug 7, 1956) [hereinafter 1954 Hague Convention] (agreeing to treat cultural property with a certain level of respect).

31. See CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 231 (2010) (noting the change over time of the perspective of member states in the WHC from a monumentalist vision to a more incorporative model that includes natural sites and places of anthropological, aesthetic, and ethnological importance as well).



change. WHC protection can accord an object or place with sanctity and reverence<sup>32</sup> and recognize its spiritual value.<sup>33</sup>

On the one hand, the WHC embodies a collective and “public” understanding of cultural heritage protection. It has shifted its focus from sovereign property of the state and historical preservation to the need to account for landscapes and natural areas that are important to humankind.<sup>34</sup> Hoping to rectify a European-inspired monumentalist vision, the Committee established under the WHC implemented unilateral “changes” to the definition of the treaty through its practice and operational guidelines. The Committee added spatial, temporal, and social dimensions of cultural heritage, incorporated cultural process and associated values (beyond merely cultural output), and accounted for the development of knowledge, scientific thought, and cultural diversity.<sup>35</sup>

Indeed, the WHC’s initial focus on monuments and buildings easily incorporated some sacred spaces into the protection of cultural heritage as long as the site itself maintained historical, aesthetic, ethnological, or anthropological value.<sup>36</sup> Yet, the dominant European monumentalist vision of cultural heritage favored Christian sacred spaces at the exclusion of places valued by other cultural and religious backgrounds. The European-centric vision prompted a reactive shift within the WHC and among state parties. They subsequently sought to capture broader representations of heritage that incorporate natural sites and provide a more holistic understanding of cultural heritage.<sup>37</sup> The culturally-sensitive approach included not just iconic human creations, but also natural areas to be protected from human development.<sup>38</sup> Thus, the WHC reflects an internationalist character

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32. See *id.* at 20–21 (noting the shift to heritage as a result of urbanization, post-colonial contexts, and globalization, which influenced the meaning of property and the importance of sites as being places beyond just physical structures).

33. See *id.* at 233–35 (noting that the shift away from a monumentalist approach of WHC sites was due to the rising voices of non-European states that desired to participate in defining the meaning of universal value pursuant to their perceptions and understanding of cultural heritage).

34. *Id.* at 27.

35. Abdulqawi Yusuf, *Definition of Cultural Heritage*, in THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY, *supra* note 23, at 33–35.

36. FORREST, *supra* note 31, at 231.

37. *Id.* at 235.

38. It is worth noting the connection between cultural heritage protection and environmental protection, given that both forms of protection relate to sustainable development. See Marina Lostal, *The Role of Specific Discipline Principles in International Law: A Parallel Analysis between Environmental and Cultural Heritage Law*, 82 NORDIC J. INT’L L. 391, 397–98 (2013) (noting the

that, even if critiqued as state-driven, attempts to capture unique objects and areas of outstanding cultural value<sup>39</sup> that are designed to reflect the value of human creativity and adaptability.<sup>40</sup> Changing patterns of cultural heritage protection can also protect various cultural groups, including indigenous peoples.<sup>41</sup>

The shift in approach towards cultural heritage highlighted and exacerbated internal problems with the WHC's processes and led to a narrowing of perceptions regarding the meaning and scope of cultural heritage. Even with altered perceptions of cultural heritage and attempts to broaden the scope of protection, it is important to recall that the WHC is a state-driven mechanism (as states propose places that are deemed to be "world" heritage sites). State interests have thus incorporated political and economic issues into cultural heritage protection processes.<sup>42</sup>

The shift away from an overly European monumentalist approach has led the WHC to become a hotbed for political machinations and bureaucratic clashes between career diplomats, rather than a haven for universal cultural heritage protection.<sup>43</sup> Protected sites have been turned into emblems,<sup>44</sup> indicating that

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difference between environmental protection and cultural heritage protection in that more precise and clearer principles have emerged in the environmental context, such as the no-harm principle, thereby making it easier to address environmental concerns in a more concerted and concrete fashion); DEREK GILLMAN, *THE IDEA OF CULTURAL HERITAGE* 181 (2010) (contrasting the development of cultural heritage protection with environmental norms, where public goods are more readily apparent and easier to identify).

39. See FORREST, *supra* note 31, at 235.

40. *Id.* at 236–37.

41. See *Uluru-Kata Tjuta National Park*, UNESCO, <http://whc.unesco.org/en/list/447> (last visited Sept. 7, 2017). The WHC listing includes places like Uluru-Kata Tjuta National Park (formerly Ayers Rock) in Australia, where the landscape represents traditional beliefs of the Anangu Aboriginal people. See also *Konso Cultural Landscape*, UNESCO, <http://whc.unesco.org/en/list/1333> (last visited Sept. 7, 2017) (suggesting that conservation of the Konso Cultural Landscape is a community effort in accordance with local customs and shared values); *Cultural Landscape of Bali Province: The Subak System as a Manifestation of the Tri Hita Karana Philosophy in Indonesia*, UNESCO, <http://whc.unesco.org/en/list/1194> (last visited Sept. 7, 2017) (detailing how the government of Bali empowered *subak* community members to help manage the cultural landscape of Bali).

42. Meskill, *supra* note 6, at 224.

43. Dennis Rodwell, *Liverpool Heritage and Development—Bridging the Gap?*, in *INDUSTRIAL HERITAGE SITES IN TRANSFORMATION: CLASH OF DISCOURSES* 73, 74 (Harald A. Mieg & Heike Oevermann eds., 2015).

44. Meskill, *supra* note 6, at 224.

individual state gains have waylaid the WHC vision.<sup>45</sup> Divergent interpretations and meanings of “outstanding universal value” reflect geopolitical fissures, rather than a common understanding of cultural heritage.<sup>46</sup> Diplomats prioritize national interests and focus less on protection, despite an abundance of sites still requiring monitoring.<sup>47</sup> Archaeological and environmental experts, who previously might have held sway at the WHC in designating a site of “outstanding universal value,” have been replaced by state ambassadors and politicians.<sup>48</sup> Rather than a cosmopolitan subset of national origin experts, one has experts who maintain a national agenda and focused interests.<sup>49</sup> National agendas eclipse substantive proposals, often acting contrariwise to International Council on Monuments and Sites (ICOMOS)<sup>50</sup> recommendations<sup>51</sup> in order to ensure that a national site

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45. Rodwell, *supra* note 43, at 76.

46. *Id.* at 73–74.

47. *Id.*

48. Meskell, *supra* note 6, at 220, 222 (noting that the recent attempt to list Syrian cultural heritage sites as being in danger was opposed by Russia, given Russian support for the Assad regime, despite the fact that the Syrian representative actually supported the move to list heritage sites as being endangered).

49. Brumann, *supra* note 6, at 2177.

50. The WHC relies on ICOMOS to enforce preservation and protection efforts and serve as its professional and scientific advisory council. See World Heritage Convention, *supra* note 16, art. 8; UNESCO, *Draft Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage*, ¶ 18, U.N. DOC. 17/C107 (Nov. 15, 1972); see also Deborah C. Roth, *Wish You Were Here: A Cross-Cultural Analysis of Architectural Preservation, Reconstruction And The Contemporary Built Environment*, 30 SYRACUSE J. INT'L L. & COM. 395, 404–05 (2003) (noting the proactive nature of ICOMOS to create viable action plans); International Council on Monuments and Sites (ICOMOS) Statutes, *adopted* May 22, 1978, art. 5, [http://www.international.icomos.org/publications/EN\\_Statuts\\_1978\\_20110301.pdf](http://www.international.icomos.org/publications/EN_Statuts_1978_20110301.pdf) (demonstrating that ICOMOS also takes part in the implementation of the Convention); *ICOMOS' Mission*, ICOMOS, <http://www.icomos.org/en/about-icomos/mission-and-vision/icomos-mission> (last visited Nov. 12, 2017) (noting that ICOMOS prepares inspection reports of properties on the World Heritage List). ICOMOS is principally a member-driven, non-state organization composed of individual and institutional members working in the field of cultural heritage.

51. Meskell, *supra* note 6, at 225.

receives a heritage listing<sup>52</sup> or still serves immediate national interests even after such a designation.<sup>53</sup>

The move towards state inclusion for all is not only because the states appoint a site for protection, but also because, under the Convention, attendant bodies of the WHC like ICOMOS and UNESCO ultimately approve state-appointed sites. The representatives in these bodies might not be cultural heritage professionals, but rather career diplomats with a cosmopolitan bend towards inclusion and bias towards a nationalist agenda.<sup>54</sup> Many of these bodies are still dominated by European states<sup>55</sup> and political infighting between states is rife.<sup>56</sup> The result is that the presumed value of a WHC site for a state (such as tourism revenue and international financial assistance for site upkeep) has trumped actual “universal” heritage protection and a notion of collective responsibility upon which the WHC was grounded.<sup>57</sup> The problems are further aggravated by decreased funding, the effects of climate change on sites that are not subject to proper protection, and overall poor management of cultural heritage sites.<sup>58</sup>

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52. Brumann, *supra* note 6, at 2184–85 (referring for example to the removal of the Galapagos Islands from the World Heritage in Danger List despite Ecuador’s weak remedial measures and contrary to the wishes of the expert bodies).

53. Thus, the designation of Liverpool, United Kingdom, as a Maritime Mercantile City under the WHC was subject to an ICOMOS investigation following a 5.5 billion pound proposal to develop Liverpool Waters, an area well within the protected heritage site area. ICOMOS concluded in a 2012 report that the development would threaten the universal value of the World Heritage Site. UNESCO, *Rep. on the State of Conservation of Properties Inscribed on the World Heritage List*, at 184, U.N. Doc. WHC-12/36.COM/7B.Add (June 1, 2012). The local city council (with an eventual endorsement by the U.K. Government) voted to go ahead with the plan given the financial magnitude of the project. Rodwell, *supra* note 43, at 40. Note that the Liverpool site was eventually placed on the List of World Heritage Sites in Danger in 2012. *List of World Heritage Sites in Danger*, UNESCO, <http://whc.unesco.org/en/danger/> (last visited Nov. 12, 2017).

54. Brumann, *supra* note 6, at 2186.

55. See Meskell, *supra* note 6, at 220 (noting that non-Western nations have criticized ICOMOS for an allegedly Eurocentric bias).

56. *Id.* at 224 (referring to the creation of the BRICS alignment—Brazil, Russia, India, China, and South Africa—as a counterbalance to the G8 power bloc that dominates UNESCO, demonstrating the ongoing economic alignments and attempts to combine political influence in determining which sites are of universal value).

57. *Id.* at 221 (noting that even the broader understanding of cultural heritage property, which includes indigenous peoples’ views on the meaning of property and heritage, has not removed the strong overlay of economically driven state interests and political assertions).

58. *Id.* at 227–28.

What impact might the WHC's focus and direction have on the protection of sacred spaces? Do avenues nevertheless exist for some form of protective niche for sacred spaces? The WHC's initial designation of various forms of protected sacred spaces has been overly European and primarily focused on Christian sites.<sup>59</sup> The designation of a sacred site under the WHC does not necessarily derive from the site's religious significance, but rather from the notion of protecting cultural heritage of worldwide importance.<sup>60</sup> Further, whether the WHC can adequately capture and protect unique sacred spaces is in question as the WHC protects selected areas, rather than every single object that is unique to cultural heritage. There is a seminal difference between sacred space that maintains elevated status because of its cultural value to humankind, as opposed to sacred space that maintains significance to a particular group of believers for religious (or other) reasons.<sup>61</sup> Sacred spaces that might merit protection given their value to a group of believers might not be of sufficient importance to a state to actually make the claim for protection, thus leaving the group unrepresented. The danger of ignoring sacred sites meriting protection is especially salient as the site nomination process has become further politicized and as nationalism and regionalism take stronger holds within states.<sup>62</sup>

Subjective criteria presented in the WHC Operational Guidelines (such as the definitions given to the terms "unique," "masterpiece," or "outstanding")<sup>63</sup> make it difficult to include protection for a variety of sacred spaces. Subjective interpretations of sacred

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59. For an overview of this problem, see UNESCO, *Rep. of the Expert Meeting on the "Global Strategy" and Thematic Studies for a Representative World Heritage List*, U.N. Doc. WHC-94/CONF.003/INF.6 (Oct. 13, 1994).

60. See Leanza, *supra* note 9, at 39–40 (noting that the same problem existed during the 2003 *Intangible Cultural Heritage Convention* and the 2005 *Cultural Diversity Convention*, concluding that there really are no multilateral agreements for protecting sacred spaces and calling for an international regime for protection to be created under UNESCO or the United Nations).

61. See Ferrari, *supra* note 7, at 10 (noting the absence of freedom of religion from discussions about sacred places and outlining the effects of that omission); see also CAROLINE EHLERT, PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW 102–03 (2014) (noting the difference between protecting cultural heritage and religious sacred space when accounting for Additional Protocol I, Articles 52 and 53, thereby suggesting that a different form of protection is necessary for sacred space).

62. Meskell, *supra* note 6, at 235.

63. See FORREST, *supra* note 31, at 238 (questioning whether standards for cultural heritage actually emerge from the work and processes of the WHC given the subjective nature of the terms).

space allow for states to ignore underrepresented minority factions and groups seen as acting contrary to state interests.<sup>64</sup> Most states are inherently linked to primacy of territory and caught up in their quest to preserve and protect their sovereign capacities,<sup>65</sup> and thus are hesitant to provide protection for holy or sacred spaces of a group at odds with the state and its ruling factions.<sup>66</sup>

One of the main problems associated with cultural heritage protection is the subjective definition adopted by states, particularly when influenced by political motivations. Because the protection process is state-centric, it is difficult to provide actual protection to designated sites. An overly subjective approach does not bode well for sacred space protection under a cultural heritage regime. It is akin to having states unilaterally decide which religions merit protection under the human right to freedom of religion (a key problem in states where minority religions are overlooked or, worse, discriminated against by the state).

### III. ENFORCEMENT ISSUES

A central problem with the WHC as a whole is that the Committee has no ability to enforce its declarations or recommendations (although placement on the World Heritage List garners international attention). While Article 6 of the WHC calls for states to take active and effective measures of preservation,<sup>67</sup> the obligations are of the good faith variety, affording the state broad latitude when acting. The Committee can request a state to abide by the WHC and can petition the United Nations General Assembly for assistance and persuasive censure.<sup>68</sup> Thus, the WHC provides

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64. See Andrea Benzo, *Towards a Definition of Sacred Places*, in BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE, *supra* note 7, at 18–19 (stating that the subjective element of sacred space pursuant to the needs and desires of religious communities is what has been proposed by the IUCN/UNESCO Guidelines when considering protection to be accorded to sacred sites).

65. FORREST, *supra* note 31, at 241.

66. See, e.g., Françoise Tulkens, *Freedom of Religion under the European Convention on Human Rights: A Precious Asset*, 2014 BYU L. REV. 509, 519–20 (2014) (noting the refusal of states to recognize or grant rights to certain faiths and the ongoing move to regulate places of worship).

67. See World Heritage Convention, *supra* note 16, art. 6.

68. This was the direction taken by the WHC (and UNESCO) when dealing with the destruction of cultural heritage in Iraq. See G.A. Res. 69/281 (May 28, 2015).

mechanisms to work with the state to protect and preserve world heritage sites.<sup>69</sup>

While a World Heritage listing provides the means for “naming and shaming” states that fail in their responsibilities, it does not provide grounds for enforcing preservation through judicial

69. World Heritage Convention, *supra* note 16, arts. 6, 7; see also Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT’L L. 619, 639–41 (2003) (noting that the capacity for UNESCO-imposed sanctions are limited solely to situations where a member’s UN membership has been suspended or if membership dues had not been paid).

An example of wanton cultural destruction involved the Buddha statues in Afghanistan that were not (at the time) part of the World Heritage List. The area of the statues’ remains was added to the list in 2003 given the importance of the cultural landscape of the area. See *Cultural Landscape and Archaeological Remains of the Bamiyan Valley*, UNESCO, <http://whc.unesco.org/sites/208rev.htm> (last visited Sept. 7, 2017).

In 1982, Afghanistan had nominated the statues for inclusion on the List, however the WHC had not issued its decision prior to the statues’ destruction. Thus, one might be able to invoke responsibility for Afghanistan given the statues’ placement on the tentative list. ROGER O’KEEFE, *THE PROTECTION OF CULTURAL PROPERTY DURING ARMED CONFLICT* 356–57 (James Crawford & John S. Bell eds., 2006) [hereinafter: O’KEEFE I]; see also Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT’L L. 183, 243–63 (2003) (discussing the effects of the WHC in the context of the Taliban’s destruction of the Bamiyan Buddhas).

Afghanistan, as a signatory to the WHC, maintained responsibility under Article 12 to protect all objects of universal cultural value in its state. Thus, in 1997, the Committee called on Afghanistan to protect the statues given their universal cultural value. See *UNESCO Report of the XXI Session of the World Heritage Committee*, ¶ VII.58, WHC-97/CONF.208/17 (Dec. 1, 1997). In the end however the WHC and UNESCO were powerless to prevent their destruction.

The United Nations’ General Assembly also had “strongly urged” the Afghan government not to destroy the statues. G.A. Res. 55/243, ¶ 3 (May 1, 2001).

Francioni notes that the destruction of the statues led to the 2003 adoption of the UNESCO *Declaration Concerning Intentional Destruction of Cultural Heritage*, which—although not binding—could invoke state responsibility for future actions given the circumstances in which the Declaration was passed. Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT’L L. 1209, 1219 (2004).

Other examples include the destruction of the Babri Mosque in Ayodhya during the Hindu-Muslim conflict in India and Kashmir in 1992 and the torching and destruction of Joseph’s Tomb in Nablus by Palestinians in 2000. See generally Roger Friedlander & Richard Hecht, *The Bodies of Nations: A Comparative Study of Religious Violence in Jerusalem and Ayodhya*, 38 HIST. RELIGIONS 101 (1998) (discussing Jerusalem and Ayodhya as contested “sacred centers”); Patty Gerstenblith *Archaeology in the Context of War: Legal Frameworks for Protecting Cultural Heritage during Armed Conflict*, 5 ARCHAEOLOGIES 18, 25–26 (2009) (discussing the destruction of protected heritage sites during the Balkan Wars).

proceedings or other countermeasures<sup>70</sup> (in contrast to the variety of avenues that exist for upholding the human right to freedom of religion).<sup>71</sup> Listing, however, potentially provides a justification for external oversight by international bodies like ICOMOS.<sup>72</sup> Additionally, it imposes state obligations deriving from the WHC's Operational Guidelines,<sup>73</sup> such as long-term legislative and regulative protections, management schemes (including preventive care and risk preparedness), delineated boundaries, regulations at all governmental levels (national, municipal, and local), safeguards against undue development, and proper buffer zones as an added layer of protection.<sup>74</sup> The Committee can confer with states through the reporting process, offering assistance and seeking solutions to ensure that the listed property is properly preserved.<sup>75</sup> The maximum penalty it can enforce is to have the site removed from the World Heritage List.<sup>76</sup>

By contrast, Article 11(4) of the Convention Concerning the Protection of the World Culture and Natural Heritage also established a "List of World Heritage in Danger." The List includes cultural and

70. See, e.g., O'KEEFE I, *supra* note 69, at 310–14 (noting that "the Convention, like the relevant rules of international humanitarian law, imposes no positive obligation on States Parties to preserve cultural heritage in territories occupied by them").

71. Examples of enforcement include the ICCPR's Human Rights Committee entertaining contentions of human rights violations against states that have consented to such a procedure and the European Convention on Human Rights and Fundamental Freedoms that provides for private challenges against states before the European Court of Human Rights.

72. Once a state consents to having a site placed on the list, the state thereby consents to submit to necessary international action as well. Gionata Buzzini & Luigi Condorelli, *List of World Heritage in Danger and Deletion of a Property from the World Heritage List*, in THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY, *supra* note 23, at 177–80.

73. See Operational Guidelines 2008, *supra* note 25. For an overview of the Operational Guidelines, see BERNARD M. FEILDEN & JUKKA JOKILEHTO, MANAGEMENT GUIDELINES FOR WORLD CULTURAL HERITAGE SITES 1–104 (1998).

74. Operational Guidelines 2008, *supra* note 25, ¶¶ 96–118.

75. *Id.* ¶¶ 172–74.

76. *Id.* ¶ 176; see also Press Release, Dresden Is Deleted from UNESCO's World Heritage List, *supra* note 2 (noting one of two sites that has been deleted to date: Dresden's Elbe Valley in 2009, due to the building of a four-lane bridge in the heart of the cultural landscape which meant that the property failed to keep its "outstanding universal value as inscribed"); Press Release, UNESCO World Heritage Ctr., Oman's Arabian Oryx Sanctuary: First Site Ever to Be Deleted from UNESCO's World Heritage List (June 28, 2007), <http://whc.unesco.org/en/news/362> (noting that the Arabian Oryx Sanctuary in Oman, home to a rare antelope, was delisted because of Oman's decision to reduce the size of the protected area by 90%, in contravention of the Operational Guidelines).



natural heritage property threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, and landslides; volcanic eruptions; and changes in water level, floods and tidal waves.<sup>77</sup>

Even though the *travaux préparatoires* to the World Heritage Convention indicate otherwise,<sup>78</sup> the Operational Guidelines support the WHC unilaterally placing a site on the danger list when there is an urgent need.<sup>79</sup> Inscribing a site on the List of World Heritage in Danger allows the WHC to deploy its experts to assist a state to find alternative solutions that preserve the site in danger.<sup>80</sup> The WHC can further attract international attention, implement safeguarding campaigns for endangered areas or species, or collaborate with the state to create additional options.<sup>81</sup> Should it see fit, the WHC also can remove a site from protection. Thus, overall, enforcement protection for sites that are eventually nominated to the WHC is rather ineffectual, focusing specifically on either forms of good faith diplomatic bargaining with states or internally driven forms of censure (such as removal from the WHC listing).<sup>82</sup>

Considering the protection sacred spaces require, the WHC is unable to protect the needs of religious groups and communities who might use a sacred space for worship, pilgrimages, communal gatherings, among other reasons. Additionally, institutional fatigue and attempts to limit site listings to a set number per year<sup>83</sup> render the WHC inadequate for meeting the needs of sacred space protection. A

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77. World Heritage Convention, *supra* note 16, art. 11(4).

78. Buzzini & Condorelli, *supra* note 72, at 180.

79. *Id.* at 183–89.

80. *Success Stories*, UNESCO, <http://whc.unesco.org/en/107> (last visited Sept. 7, 2017).

81. See, e.g., Chris Hedges, *Giza Journal; Now Even the Sphinx Might Protest*, N.Y. TIMES (Dec. 10, 1994) <http://www.nytimes.com/1994/12/10/world/giza-journal-now-even-the-sphinx-might-protest.html> (reporting that Egypt altered its plans for an eight-lane highway near the Giza pyramids after UNESCO threatened to put the Pyramids on the “List of World Heritage In Danger”).

82. But see FORREST, *supra* note 31, at 277 (noting the possibility of an obligation *erga omnes* on state parties to uphold the WHC, albeit lacking any real enforcement method).

83. *Id.* at 285.

form of customary international law concerning the importance of cultural heritage for humankind may have emerged from the WHC,<sup>84</sup> but it does not provide adequate protection for sacred spaces given that it is a broad normative principle and there is a lack of enforcement tools.

#### IV. CONSIDERING THE CONFLICT CONTEXT

While protection of cultural property during wartime might not be as relevant,<sup>85</sup> it merits mention simply to consider the approach and meaning given to cultural heritage (as it might more readily incorporate sacred space protection) and possible avenues of enforcement (that might differ from peacetime cultural heritage protection). Indeed, debate has ensued over the scope of protection accorded to cultural heritage under the Geneva Conventions and the 1954 Hague Convention.<sup>86</sup> This discussion is relevant to the protection of religious sites and sacred spaces.

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84. *Id.* at 405.

85. The distinguishing factor for protection during conflict is the degree of deference towards military necessity under the Geneva Conventions, as discussed by Alice Fabris, *Military Necessity under the 1954 Hague Convention*, 2 SANTANDER ART & CULTURE L. REV. 275 (2015), despite the ongoing convergence between international humanitarian law and international human rights.

86. See, e.g., Ana Filipa Vrdoljak, *Human Rights and Illicit Trade in Cultural Objects*, in CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY: NEW DEVELOPMENTS IN INTERNATIONAL LAW 107 (Silvia Borelli & Federico Lenzerini eds., 2012) (finding the cross-fertilization between human rights and cultural heritage law in the field of cultural heritage has enabled a refinement of the rights held and obligations owed by States); EHLERT, *supra* note 61, at 37–59 (analyzing the interface between international humanitarian law and international criminal law in terms of the destruction of cultural property and related prosecutions); Federico Lenzerini, *The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 40, 41 (Francesco Francioni & James Gordley eds., 2013) (noting that by the beginning of the 20<sup>th</sup> century, the international community produced legal norms aimed at preventing attacks against cultural property and enforcing their punishment); Marina L. Becerill, *The Meaning and Protection of ‘Cultural Objects and Places of Worship’ Under the 1977 Additional Protocols*, 59 NETH. INT’L L. REV. 455 (2012) (arguing that the 1954 Hague Convention offers stricter guarantees against the likelihood of acts of hostility aimed at cultural property); LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 388 (2008) (“The main purpose of both the Hague and the Geneva Laws is to minimise the horrors of the conflict to the extent consistent with the economic and effective use of armed force while not inhibiting the . . . parties in their endeavor to achieve victory with minimum cost to themselves.”); Roger O’Keefe, *The Meaning of ‘Cultural Property’ under the 1954*

The 1954 Hague Convention provides protection for cultural property, defined as “moveable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular . . . .”<sup>87</sup> The key phrase in the Hague Convention, “cultural heritage of every people,” can be understood in a restrictive sense as referring to an object or place of world renown<sup>88</sup> or, in a more inclusive sense, to each state party’s national cultural heritage, as defined by that state.<sup>89</sup>

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*Hague Convention*, 46 NETH. INT’L L. REV. 26 (1999) [hereinafter O’KEEFE II] (discussing the range of cultural property that is held to fall within Article 1); Karl J. Partsch, *Protection of Cultural Property*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 377 (Dieter Fleck ed., 1995) (discussing both the historical development of the protection of cultural property and the current state and applicability of such protections); Karen J. Detling, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT’L L. & TRADE 41, 59 (1993) (discussing the 1954 Hague Convention’s apparent failure in the former Yugoslavia, and whether the provisions are sufficient); PATRICK J. BOYLAN, REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (1993) (recommending technical improvements to the Convention’s provisions due to the many highly-publicized cases of destroyed cultural properties, and for High Contracting Parties to the Convention to submit potentially eligible cultural sites for “special protection”).

87. 1954 Hague Convention, *supra* note 30, art. 1(a). This Convention also applies to non-international conflicts. *See id.* art. 3 (“The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”).

88. O’KEEFE II, *supra* note 86, at 28–29 (outlining the two approaches to the meaning of cultural heritage); Eagen, *supra* note 20, at 422, 443. *See also* LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 179 n.208 (2008) (citing examples of protected cultural property under the Hague Convention); Detling, *supra* note 86, at 52 (referring to the 1954 Hague Convention’s Preamble to demonstrate the Convention’s focus on preventing damage to the cultural property of the world); Partsch, *supra* note 86, at 377 (referring to cultural property in the restrictive sense).

89. While most commentators prefer the restrictive interpretation, O’Keefe adopts the inclusive approach. O’KEEFE II, *supra* note 86, at 29; *see also* O’KEEFE I, *supra* note 69, at 104–05 (using the restrictive approach). *But see* John. H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 846–47 (1986) (proposing a distinction between cultural internationalism, a more restrictive approach, and cultural nationalism, an inclusive approach). For Merryman, the 1954 Hague Convention reflects a cultural internationalist/restrictive approach given the focus on preserving the cultural property of the world; whereas treaties that focus on state retention and protection of its national cultural heritage pursuant to that state’s laws, like the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer

Jiri Toman, upon analyzing the Convention's *travaux préparatoires*, indicates an inclination towards the restrictive approach, pointing to statements by different countries including France (calling for a general definition that is to be expanded upon by states) and the United States (calling for a clear general statement with an illustrative list of examples for states).<sup>90</sup> Following the French withdrawal of their proposal, Toman concludes that the key determinant factor under the Hague Convention is the overall, universal, cultural value of property, with no distinction as to the origin or ownership of the property in question.<sup>91</sup>

By contrast, O'Keefe refers to the treaty preamble ("cultural property of any people . . . since each people makes its contribution to the culture of the world") to demonstrate that the meaning of "cultural heritage" in Article 1 refers to the national cultural heritage of each respective party.<sup>92</sup> O'Keefe also notes that periodic state reports under the Convention refer to cultural property that states deem important to their national cultural heritage, and that the implication of the

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of Ownership of Cultural Property, reflect a cultural nationalism/inclusive approach. *Id.* at 845–46. Merryman asserts that the cultural nationalism approach, while problematic because states largely lack legislation or capacities for protection, dominates in the international sphere. *Id.* at 846–47. Nevertheless, Merryman is comparing a treaty that requires internal perceptions (the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property) where a state is inwardly looking to prevent illicit activities, as opposed to a treaty like the 1954 Hague Convention that is attempting to regulate confrontational activities between states such as during wartime. He also seems to ignore efforts like the World Heritage Convention that adopts an internationalist understanding of cultural property. Note that Merryman does elaborate on cultural internationalism in John. H. Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 11 (2005).

90. JIRI TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* 48 (1996).

91. *Id.* at 48–51. The decision to protect the property, however, is up to the state. Toman also notes a proposal by treaty drafters to include all religious buildings under the Convention, but the proposal was removed for being too broad. Religious buildings were considered to be included if they are of a high cultural value or are monuments of art, architecture, or history. This section also discusses protection for "remarkable" religious buildings due to archeological, historical, or aesthetic interests or those commemorating a person or event.

92. O'KEEFE I, *supra* note 69, at 104; see also Francesco Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law*, in *ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW*, *supra* note 86, at 11 (asserting that cultural property is driven by national identity because the shift of protection to the associative elements of an ethnic group or state towards cultural heritage implies a national oriented understanding of the importance of cultural heritage).

*travaux preparatoires* in intentionally using an open-ended meaning of cultural heritage implies a degree of selectivity for each state based on cultural significance of the property at issue.<sup>93</sup>

The Geneva Conventions and the 1977 Additional Protocols, on the other hand, use somewhat open-ended language when considering cultural heritage property protection. For example, Additional Protocol I in Article 53<sup>94</sup> (and Additional Protocol II in article 16) use the term “peoples.”<sup>95</sup> This indicates that protection transcends national borders, with “spiritual heritage” relating to sites independent of cultural values.<sup>96</sup> The key difference between the Additional Protocols as opposed to the 1954 Hague Convention appears to be that, under the former, the protection of cultural heritage property is immediately

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93. O'KEEFE I, *supra* note 69, at 105–06. O'Keefe also refers to French statements in the *travaux preparatoires* regarding a preference for a general definition (with a view to having states determine the meaning of the term), the Italian and Israeli delegates who declared that the meaning of cultural heritage will be expanded upon by each state, and ensuing state reports that tend to base the meaning of cultural heritage on their domestic law. O'Keefe notes that the language of Article 1 implying a more restrictive understanding (“great importance of the cultural heritage of every people”) was a compromise and is non-committal language that leaves room open to the states to apply the Hague Convention pursuant to their own (national/domestic) understanding of cultural heritage. *But see* M. Lostal-Becerril, *The Meaning and Protection of Cultural Objects and Places of Worship Under the 1977 Additional Protocols*, 59 NETH. INT'L L. REV. 455, 456 (2012) (offering a broader approach to the meaning and interpretation of cultural property under the Additional Protocols).

94. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 1, 1125 U.N.T.S. 609, art. 53 (entered into force Dec. 7, 1978) [hereinafter Protocol I]. The language of the Additional Protocol I, for example, is: “[I]t is prohibited: (a) To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.” *Id.*

95. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, art. 1, 1125 U.N.T.S. 3, art. 16 (entered into force Dec. 7, 1978) [hereinafter Protocol II].

96. Vrdoljak, *supra* note 86, at 111. Vrdoljak concludes that the 1954 Hague Convention offers wider protection for cultural heritage as it uses the language “every people,” thereby capturing a broader group. Vrdoljak notes additional sources for cultural heritage protection as deriving from rights like self-determination, property, and minority rights, given the meaning accorded to “people” under the Additional Protocols as capturing all groups and protecting all forms of different cultures. *But see* EHLERT, *supra* note 61, at 70–71 (pointing to a narrower interpretation of “peoples” in the Additional Protocols that suggests the Additional Protocols sought to only protect objects “of such importance that everyone will recognize it”).

recognizable as such to the world at large.<sup>97</sup> Also, there is no derogation for military necessity in the Additional Protocols, in contrast to the 1954 Hague Convention where military necessity is a key factor.<sup>98</sup> Of course, if an enemy attacks a cultural heritage site and there is no way for the state to counter-attack without avoiding the site, it may be destroyed.<sup>99</sup> Thus, in a sliding scale form of designation, the 1954 Hague Convention provides protection for “important” cultural heritage property, the Additional Protocols provide protection for a narrower form of cultural property, and the WHC has the narrowest focus on “outstanding value” as the key standard for designation and protection.<sup>100</sup>

For treaties like the 1954 Hague Convention and, to a certain extent, the Geneva Conventions, enforcement mechanisms are essentially non-existent. Post-war criminal trials suggest binding treaty aspects for cultural heritage protection during conflict that could also impact sacred space protection. For example, the Cambodian Court statute outlined processes for bringing suspects responsible for the destruction of cultural property (as understood under the 1954 Hague Convention) to trial.<sup>101</sup> The International Criminal Tribunal for the Former Yugoslavia has decided a number of cases concerning the intentional destruction of religious buildings.<sup>102</sup> The International

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97. See, e.g., Roger O’Keefe, *Protection of Cultural Property*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 433, 439 (Dieter Fleck ed., 2008). O’Keefe notes that, while the difference between the treaties is really not meant to be significant (despite the different wording that is used), the Additional Protocols are understood as being subject to the interpretation accorded to the terms (“heritage of peoples”) pursuant to each state party and their respective people. The ICRC Commentary, referenced by the author at 440, notes that the heritage protection should be referenced by the people whose heritage it is, and that the “spiritual heritage,” while referring to places of worship, is essentially equivalent to the cultural heritage property being protected under the 1954 Hague Convention.

98. See, e.g., Fabris, *supra* note 85, at 278–81 (exploring a part of the 1954 Hague Convention’s protection of cultural property in armed conflict that provides a waiver to this protection through “military necessity”).

99. EHLERT, *supra* note 61, at 76–77.

100. See, e.g., *id.* at 103 (providing an analysis on how these protocols work to provide protection for cultural property).

101. See Law on the Establishment of the Extraordinary Chamber of the Courts of Cambodia, NS/RKM/1004/006, art. 7 (Oct. 27, 2004), [https://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

102. See, e.g., Prosecutor v. Du [Ko Tadi], IT-94-1-T, Opinion and Judgment, ¶¶ 465, 717 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts/j70507JT2-e.pdf> (finding

Criminal Court has begun to consider such cases,<sup>103</sup> leading to a guilty plea by one defendant.<sup>104</sup> Furthermore, the Second Additional Protocol of the 1954 Hague Convention, which addresses enhanced protection of cultural property during conflict, calls on states in Articles 15 to 18 to criminally prosecute serious violations of the treaty,<sup>105</sup> as do the 1977 Additional Protocols to the Geneva Conventions.<sup>106</sup> Whether this will have any impact on state behavior or deter the destruction of cultural heritage and, by extension, sacred sites still remains to be seen.

Sacred spaces require a holistic protection approach that avoids a sovereign-based framework (and its ensuing politics, as

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persecution where defendants, among other crimes, targeted non-Serb religious institutions for destruction); *Prosecutor v. Jokic*, IT-01-42/1-S, Sentencing Judgement, ¶¶ 46–51 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004), [http://www.icty.org/x/cases/miodrag\\_jokic/tjug/en/jok-sj040318e.pdf](http://www.icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf) (finding an attack on “the cultural heritage of humankind” when Dubrovnik—a World Heritage Convention site meriting a high degree of gravity and protection—was destroyed); *Prosecutor v. Strugar*, IT-01-42-T, Judgement, ¶¶ 229–32 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005), <http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf> (finding violations of international humanitarian law where defendants attacked the Old Town of Dubrovnik, a protected site); *Prosecutor v. Kordic*, IT-95-14/2-T, Judgement, ¶¶ 207, 356 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kor-tj010226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf) (noting that attacks on religious buildings, although direct and specific, also implicate harm in a spiritual sense to a group of people).

103. See Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 8 § 2(b)(ix), 37 I.L.M. 999, 1007, 2187 U.N.T.S. 90, 95 (entered into force July 1, 2002) (defining “[i]ntentionally directing attacks against buildings dedicated to religion” as a war crime).

104. See, e.g., *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence (Sept. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF) (finding the defendant guilty of war crimes including directly attacking religious buildings); see also Ruth Maclean, ‘I am Sorry’: Islamist Apologises for Destroying Timbuktu, *GUARDIAN* (Aug. 22, 2016, 8:32 AM), <https://www.theguardian.com/world/2016/aug/22/islamic-extremist-pleads-guilty-at-icc-to-timbuktu-cultural-destruction> (describing defendant’s guilty plea to destroying religious monuments before the International Criminal Court).

105. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26 1999, arts. 15–18, 2253 U.N.T.S. 172, 218–19. Note that the Protocol only has only been ratified by 21 states, which demonstrates it has not attained across-the-board approval by states.

106. See EHLERT, *supra* note 61, at 70–74 (discussing the 1977 Additional Protocols to the Geneva Convention that address the definition and protection of cultural property); see also Lenzerini, *supra* note 86, at 41 (including the 1977 Protocols to the Geneva Conventions among a number of international legal norms promulgated in the twentieth century to prevent belligerent acts against cultural property).

currently witnessed within the WHC).<sup>107</sup> Sacred space is characterized as a place where a deity or other form of holiness exists for a group, thereby requiring respect and sanctity.<sup>108</sup> Even holy cities serve as an example of sacred symbolism of space that merits protection on grounds of religious or other importance.<sup>109</sup>

Recognizing that sacred space requires some form of protection, be it for humankind, indigenous people who maintain a connection to a site, or other groups with needs deriving from their beliefs, the question then becomes how to identify a viable source for protection of sacred spaces? Some have referred to a variety of soft law sources to provide a framework for protection. Petkoff looks to grassroots approaches in different countries, where religious actors and groups took the reins to assert sacred space protection in post-conflict situations.<sup>110</sup> The benefit of a grassroots approach is that it allows groups to be actively involved in defining what constitutes sacred space.<sup>111</sup> Evans asserts that freedom of religion rights, which, by extension, include the freedom of worship and sacred space, can be strengthened through existing international mechanisms, such as the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination, to assist in supplementing treaties and further entrench customary international law.<sup>112</sup>

The development of international normative protections for freedom of religion and sacred space protection is not immediately sufficient to provide meaningful protection for sacred space. References to soft law highlight an emerging consensus regarding the importance of listening to religious groups and their needs concerning sacred space. Following the 2010 international seminar on the *Role of*

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107. See Lenzerini, *supra* note 86, at 55–56 (asserting that cultural heritage protection is adopting a more holistic perspective and moving away from a state-oriented framework such that an attack against a WHC site can be deemed a violation against all humanity).

108. See, e.g., Yahya Pallavicini, 'God has made the earth like a carpet': *The Sacred Places in the Islamic Tradition*, in BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE, *supra* note 7, at 103 (discussing sacred spaces as conceived by the Islamic Revelation).

109. *Id.* at 113.

110. Petkoff, *supra* note 8, at 68–70 (noting the addition of a common local environment and inherent connection of different groups that served as a further means of supplementing international law in transitional societies).

111. *Id.* at 70.

112. Carolyn Evans, *Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination*, 2007 BYU L. REV. 617, 619 (2007).



*Religious Communities in the Management of World Heritage Properties* held in Ukraine and sponsored by UNESCO, the ensuing *Statement on the Protection of Religious Properties within the Framework of the World Heritage Convention*<sup>113</sup> called on the inclusion of religious communities as part of the decision-making process.<sup>114</sup> Similarly, the 2008 UNESCO/IUCN *Sacred Natural Sites: Guidelines for Protected Area Managers* specifically calls for the involvement and participation of local stakeholders in decision-making about sacred sites and management policies.<sup>115</sup> Indeed there is a call for deference to religious communities and their perceptions of a sacred site even within the WHC, which is steeped in the universality of cultural heritage.<sup>116</sup> The emphasis on non-state actors indicates the unique nature of sacred space and the potential impact that individually-driven human rights can have on establishing and protecting sacred space protection.

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113. *Statement on the Protection of Religious Properties within the Framework of the World Heritage Convention*, UNESCO (Nov. 5, 2010), <http://whc.unesco.org/en/religious-sacred-heritage/>.

114. *Id.* Note, for example, the following articles:

4. Recognized the role played by religious communities in the creation, maintenance, and continuous shaping of sacred places, and the custodial role played by them in caring for these as living heritage.

5. Reaffirmed the vital further role of religious communities in conveying, expressing and sustaining spiritual identity, meaning and purpose to human life, considering that these offer significant opportunities in a fast developing and globalizing world, as well as presenting serious challenges.

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8. Emphasized that the continuing nature of religious heritage calls for dialogue and mutual understanding between the religious communities concerned and all other stakeholders, who must work together to preserve the significance of cultural, mixed and natural heritage sites associated with the sacred.

See also ICOMOS 17TH GENERAL ASSEMBLY, *Resolution 17GA 2011/35*, in RESOLUTIONS OF THE GENERAL ASSEMBLY 20 (Dec. 2, 2011), <http://whc.unesco.org/uploads/activities/documents/activity-646-1.pdf> (encouraging the establishment of an ICOMOS working group towards the foundation of an International Scientific Committee to address religious, sacred, and spiritual heritage, given the complexity of such sites and the need to incorporate different interests and diverse issues).

115. INT'L UNION FOR CONSERVATION OF NATURE, *supra* note 8, 43–47; see also Andrea Benzo, *Towards a Definition of Sacred Places*, in BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE, *supra* note 7, at 18–19 (noting the Dayton and Bosnia Accords as examples of a tendency towards a local orientation and involvement of local actors when protecting sacred spaces).

116. Benzo, *supra* note 115, at 21.

## V. FREEDOM OF RELIGION OR BELIEF

Recognizing the importance of local actors and stakeholders involved in sacred space protection, it is also worth considering the protection of sacred space through the lens of the international human right to freedom of religion or belief.<sup>117</sup> The right incorporates protection for worship and has not been interpreted as requiring states to allow religious groups to have a place of worship.<sup>118</sup> Yet the human right to freedom of religion or belief relates specifically to places of worship, as a form of manifesting one's religion or belief.<sup>119</sup> This does not necessarily mean that a place deemed holy or sacred by a particular group will automatically receive protection as a sacred space under the human right to freedom of religion or belief. Rather, international oversight bodies have interpreted the human right to freedom of religion or belief objectively, protecting actions specifically demanded by the religion pursuant to the doctrine and edicts imposed on believers.<sup>120</sup>

The right to freedom of religion or belief could be interpreted as failing to reach added forms of meaningful protection to sacred space beyond the context of actual manifestation of a belief. Yet, the right to

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117. Cf. *id.* at 17 (noting how the protection of sacred space stems from the freedom of religion or belief, while also asserting that a proper understanding of sacred space is warranted to provide such areas with full protection).

118. See Press Release, Eur. Court of Human Rights, Refusal to provide the Mersin and İzmir Jehovah's Witnesses with an appropriate place of worship breached their right to freedom of religion (May 24, 2016) (on file with author) (announcing the Court's finding of a violation of Article 9 freedom of religion or belief for a group denied a place of worship despite a wide margin of appreciation to states when considering urban planning issues); see also W. Cole Durham, Jr., *Facilitating Freedom of Religion or Belief Through Religious Association Laws*, in *FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK* 321, 358–59 (Tore Lindholm et al. eds., 2004) (discussing limitations to the freedom of religion or belief).

119. See also Press Release, Eur. Court of Human Rights, Chamber Judgment, *Perry v. Latvia* (Nov. 8, 2007), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-2160978-2296239&filename=003-2160978-2296239.pdf> (finding that the denial of a residency permit for a pastor interfered with the applicant's right to freedom of religion, specifically to serve as a pastor for the religious community in question).

120. See, e.g., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, General Comment 35, ¶ 4, U.N. Doc. HRI/GEN/Rev.1 (July 29, 1994) [hereinafter *Compilation of General Comments*] (explaining what objective factors are considered to be part of religion). A similar result generally has ensued in the ECHR context. See, e.g., *Metropolitan Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 81 (lack of official state recognition to a church resulted in inability to manifest religious freedoms).

freedom of religion or belief need not be read so narrowly. Two of the right's features could establish holy site protection.

The first is the capacity of religious groups to collectively assert their right to freedom of religion or belief, thereby shifting from an individualistic conception of the right to a communal approach. Therefore, the freedom of religion or belief—a human right deriving from a liberalist, individual-oriented, and cosmopolitan framework—can ironically protect communal sacred spaces. Groups could demand communal sacred space recognition as unique as a means of preserving their cultural identity.<sup>121</sup>

Protecting cultural heritage through the WHC is a difficult process. Incorporating a sacred space protection framework into this troubled regime poses a number of issues. First, infrastructure does not exist to protect these sites. Second, states and their bureaucrats decide which sites merit protection. In contrast, the freedom of religion or belief usually places that responsibility on groups who use a sacred space and deem it to merit protection. In this community-centered model, protection is often determined by minority groups that maintain a key stake in creating protective status for their sacred sites.

The human right to freedom of religion or belief potentially contains group-oriented protections, rituals, and ceremonial acts giving expression to belief.<sup>122</sup> Indeed, the Human Rights Committee charged with interpreting and enforcing the right to freedom of religion or belief under the International Covenant on Civil and Political Rights purposefully did not delineate a distinction between practice and observance of a religion or belief.<sup>123</sup> Religions—not states—define what is important to them, especially since religious life cannot be compartmentalized into pre-determined contexts.<sup>124</sup>

Diversification is also reflected in property rights when considering areas of significance to a particular group, such as sacred

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121. Emmanuelle Tourme-Jouannet, *The International Law of Recognition*, 24 EUR. J. INT'L L. 667, 672 (2013).

122. See Human Rights Comm., Views: Communication No. 721/1996, ¶ 2.2, U.N. Doc. CCPR/C/74/D/721/1996 (Apr. 15, 2002) (noting that the concept of worship extends to ritual and ceremonial acts).

123. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 18, S. Exec. Doc. E, 95-2, at 29 (1978), 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976) (including practice and observance as manifestation of religion); see also Compilation of General Comments, *supra* note 120 (separately listing observance and practice and noting that the list of manifested acts is non-exhaustive as the right encompasses a broad range of acts).

124. BIELEFELDT ET AL., *supra* note 14, at 98.

space. UNESCO's 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, for example, perceives cultural property as conveying the identity and values of the group itself<sup>125</sup> and the Council of Europe's 1995 *Framework Convention for the Protection of National Minorities* proposes a group-orientation towards rights, specifically one that centers on the group's identity.<sup>126</sup> These documents reflect the notion of celebrating differences between groups and providing rights to preserve such groups.<sup>127</sup> While human rights might temper the realization of a group's assertion of cultural identity,<sup>128</sup> reliance on the freedom of religion or belief as grounds for protecting a group's sacred space can enhance the desired protection to be accorded to cultural property and heritage of such groups, evidenced as well by the 2007 *UN Declaration on the Rights of Indigenous Peoples*.<sup>129</sup>

The second feature is that manifestation can be understood as not only being linked to a specific practice mandated by the belief, but can also incorporate aspects relevant to group identity that maintain a religion or belief. For example, in one of the concurring opinions of the *Awas Tingi* case,<sup>130</sup> the court emphasizes the importance of the land's spiritual significance, asserting that community notions of landscapes are key to religious rituals.<sup>131</sup> Collective group rights may derive from religious beliefs and spirituality, depending on group perceptions, and

125. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, arts. 2, 4, *opened for signature* Oct. 20, 2005, 2440 U.N.T.S. 311 (entered into force Mar. 18, 2007).

126. Framework Convention for the Protection of National Minorities, *opened for signature* Nov. 10, 1994, art. 5, E.T.S. 157 (entered into force 1998).

127. Tourne-Jouannet, *supra* note 121, at 678–79.

128. See *id.* at 687 (discussing female circumcision as an example).

129. G.A. Res 61/295, arts. 11, 12, 25 (Sept. 13, 2007), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (affirming that indigenous peoples have the right to enjoy, practice, and maintain their religious freedoms as a human right); see also Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 698 (1993) (discussing the importance of protecting minority indigenous cultures from being overwhelmed by the dominant culture).

130. Mayanga (Sumo) Awas Tingni Community v. Nicaragua, Judgement, Ser. C, No. 79 (Inter-Am. Ct. H.R. Aug. 31, 2001), [https://www.escri-net.org/sites/default/files/seriec\\_79\\_ing\\_0.pdf](https://www.escri-net.org/sites/default/files/seriec_79_ing_0.pdf).

131. *Id.* at Joint Separate Opinion of Judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli, ¶ 2 (noting “the vital importance of the relationship of the members of the Community with the lands they occupy . . . for their family, cultural and religious development”).

may make rights to property more difficult to enforce.<sup>132</sup> An understanding of heritage as a channel through which groups manifest social values rooted in generational norms<sup>133</sup> indicates that groups have a role to play in claiming and protecting sacred spaces under the guise of the freedom of religion or belief.<sup>134</sup> In *Matsipane Mosetlhanyane v. Attorney General of Botswana*,<sup>135</sup> for example, a local tribe was allowed to make use of existing groundwater sources to

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132. See, e.g., Bryan Neihart, *Awas Tingni v. Nicaragua Reconsidered: Grounding Indigenous Peoples' Land Rights in Religious Freedom*, 42 DENV. J. INT'L L. & POL'Y 77, 88 (2013) (describing how the "exercise of individual rights," such as collective land ownership rights, is necessary to "protect [indigenous peoples] against the intrusion of the state"). Neihart also refers to *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1062–63 (9th Cir. 2008), where the Ninth Circuit found no interference with the free exercise clause resulting from wastewater use on tribal lands. The court seemingly did not understand that indigenous peoples' concept of land ownership and property stems from a cultural and religious comprehension, such that the matter was an issue of cultural integrity and not a determination as to whether the wastewater use was a substantial burden on the tribe's property or beliefs. *Id.* at 90; see also *Save the Peaks Coalition v. U.S. Forest Service*, 669 F.3d 1025 (9th Cir. 2012) (disregarding the spiritual value of the land for the indigenous plaintiffs, focusing rather on alleged environmental violations in a land dispute).

133. DEREK GILLMAN, *THE IDEA OF CULTURAL HERITAGE* 21 (2010).

134. See also *Sindicatul "Pastoral Cel Bun" v. Romania* [GC], 2013-V Eur. Ct. H.R. 41 (discussing how a church group's belief trumps the right of its priests to unionize); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, (Ser. C) No. 245 (Inter-Am. Ct. H.R. June 27, 2012), [http://corteidh.or.cr/docs/casos/articulos/seriec\\_245\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf) (asserting cultural rights to protect indigenous lands from oil exploration); *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, (Ser. C) No. 125, (Inter-Am. Ct. H.R. June 17, 2005), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_125\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf) (discussing a conflict related to land use and violation of traditional, religious ideals); *Endorois Community v. Kenya*, Comm. No. 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 9–17 (2006) (arguing on the basis of freedom of religion to ensure tribal access to a lake in an area designated as a national park). These cases are examples in other international bodies and indicate a key role for group perceptions as determining the contours of the right to freedom of religion or belief. See also *Report of the Special Rapporteur on freedom of religion or belief*, ¶ 93, U.N. Doc. E/CN.4/1997/91/Add.1 (Feb. 14, 1997) (urging state to settle conflict related to a Babri mosque and proposed Hindu temple by finding terms acceptable to both the Muslim and Hindu communities, rather than resorting to legal means); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(a)(1) (2000) (disallowing reliance on eminent domain if it would prevent a group from engaging in conduct or a religious experience mandated by its faith).

135. Civ. App. No. CACLB-074-10, ¶ 19 (Ct. App. Jan. 27, 2011) (Bots.).

ensure that the tribal members could continue to subsist and have access to water for living purposes on their traditional lands.

Thus, sacred spaces of customary significance could find protection under the human right to freedom of religion or belief. Because a group maintains an affinity towards its members who adhere to specific practices and utilize sacred sites that merit protection, the reliance on an individual right to freedom of religion or belief provides an inroad to secure group protection for individuals linked together by a common conception.<sup>136</sup> A group's reliance on the international human right to freedom of religion or belief to protect its sacred space avoids the emergence of an impersonal form of cosmopolitan cultural heritage protection. What is important is that the group assigns values of significance and sacredness to a site, rather than that the site be culturally significant to world heritage.<sup>137</sup> Further, the potential for a group's overly instrumentalist form of sacred space protection at the expense of another group's rights, such as the Taliban destroying the Bamiyan Buddha statues, can be tempered by the human right to freedom of religion or belief as the right comes to define the contours and framework for a group's claim to sacred space protection.<sup>138</sup>

Acknowledging a role for groups in creating the contours for a belief of a group also allows for a broader, and possibly more subjective, approach to the capacity for manifestation of such beliefs, thereby further expanding the grounds for protecting sacred space under the guise of the freedom of religion or belief. Indeed, part of the ongoing critique is that sidelining practices that might not reflect an "orthodox" manifestation of a belief discourages diversity within groups<sup>139</sup> and does not reflect the manner by which belief systems develop and grow.<sup>140</sup> Understanding manifestation solely as providing for actions that are required or mandated by a belief system<sup>141</sup> ignores the larger

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136. GILLMAN, *supra* note 133, at 186 (noting that, even in a liberal context, some form of particularism is required given a person's inherent cultural allegiances and personal identification).

137. BIELEFELDT ET AL., *supra* note 14, at 141 (referring to a 1996 review of Australian legislation by E. Evatt).

138. GILLMAN, *supra* note 133, at 45–46.

139. Lourdes Peroni, *The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review*, 89 CHI. KENT L. REV. 663, 665–66 (2014).

140. *Id.*

141. See, e.g., *Jones v. United Kingdom*, App. No. 42639/04, Eur. Ct. H.R. 1, 5 (2005) (finding that the ECHR could disallow photographs of the deceased on their gravestone since it was not mandated by a religious group, even though the religion itself allows for photographs on graves).

demands of religion external to formal doctrines and other voices not necessarily reflective of mainstream thinking, thereby stultifying religion as being solely operative for theological implications.<sup>142</sup>

Religions or belief systems maintain traditions that are dynamic and continuously reflective of cultural and social developments.<sup>143</sup> Monolithic conceptions of religion result not only in less religious freedom, but also in discounting a group's development while cementing a unitary vision of religion overall.<sup>144</sup> States may desire religious uniformity and stability among religions at the expense of individual rights.<sup>145</sup> A desire for uniformity is contrary to the underlying goal of the human right to freedom of religion or belief that strives for religious pluralism as a foundation of democratic society.<sup>146</sup> Such a restricted view of religion or belief may negatively affect sacred space protection as many cases might involve space that serves (or served) to motivate or enhance a religious experience, rather than turn on an actual "demand" of the religion or belief to worship at a specific site. Thus, the African Commission on Human and Peoples' Rights found a violation of religious freedom for a group of indigenous peoples evicted from their ancestral lands who would not be able to maintain practices central to their culture and religion.<sup>147</sup> Such an argument would be quite difficult to maintain under the guise of cultural heritage protection, both from a structural sense of the afforded protections and upon recalling the overall state-driven nature of cultural heritage protection.

Furthermore, there are a number of instances in which beliefs served as the motivating force for an action and were accepted under

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142. Peroni, *supra* note 139, at 675.

143. See, e.g., Singh v. France, App. No. 24479/07, Eur. Ct. H.R. 1 (2008) (presenting an essentialist understanding of the Sikh requirement to wear a turban, thereby discounting Sikh believers who perceive the turban requirement in a different manner and with a different form of manifestation).

144. Bernadette Meyler, *The Limits of Group Rights: Religious Institutions and Religious Minorities in International Law*, 22 ST. JOHN'S J. LEG. COMMENT. 535, 538 (2007).

145. *Id.* at 547 (referring to Chaare Shalom v. France, where the ECHR discounted the needs of a Jewish group demanding stricter cow slaughter requirements on the grounds of the margin of appreciation).

146. See, e.g., Nolan & K. v. Russia, App. No. 2515/04, Eur. Ct. H.R. 1, 73 (2009) (holding that national security did not justify impinging on an individual right to freedom of religion or belief because of the primordial importance of religious pluralism).

147. Endorois v. Kenya, 276/2003, Afr. Comm'n H.P.R., ¶ 173 (Nov. 11, 2009), [http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46_276_03_eng.pdf).

the guise of freedom of religion or belief.<sup>148</sup> One example that stands out is the practice of pacifism among Jehovah's Witnesses. Pacifism is by no means a "required practice" for Jehovah's Witnesses despite their commitment to the notion of pacifist ideals, yet courts have treated pacifism as required dogma for all Jehovah's Witnesses and deemed pacifism as a form of manifesting their beliefs.<sup>149</sup>

Further indication that manifestation may be grounds to protect sacred spaces is a variety of recent Human Rights Council ("HRC") Resolutions addressing the scope of the human right to freedom of religion or belief.<sup>150</sup> In 2007 for example, the HRC called on states specifically to respect religious places like sacred sites and shrines.<sup>151</sup> Religious or spiritual groups value sites for their material

148. Peroni, *supra* note 139, at 672 (referring to ECHR cases that have "implicitly or explicitly required conformity with religious mandates" for purposes of Article 9 of the ECHR); *see, e.g.*, Gatis Kovalkovs v. Latvia, App. No. 35021/05, ¶ 64 (Eur. Ct. H.R. 2012) (finding that a *Hare Krishna* believer can use incense sticks in prison—which is not an obligation under their belief system—but use is limited due to public security limitations in the prison); Jakobski v. Poland, App. No. 18429/06, ¶ 45 (Eur. Ct. H.R. Mar. 7, 2011) (finding that a Buddhist prisoner's vegetarianism was inspired by religion); Eweida and Others v. United Kingdom, 2013-I Eur. Ct. H.R. 215, 252–53 (finding that wearing a cross was motivated by belief and upheld as a protected practice because "there is no requirement on the applicant to establish that he or she acted in fulfillment of a duty mandated by the religion in question" to meet an Article 9 claim); *see also* I. Leigh & A. Hambler, *Religious Symbols, Conscience, and the Rights of Others*, 3 OXFORD J.L. & RELIGION 2, 3 (2014) (further examining Eweida's positive outcome for religious claimants and its implications).

149. *See* Bayatyan v. Armenia, 2011-IV Eur. Ct. H.R. 1, 21 (noting the applicant's religious convictions as a Jehovah's Witness and refusal to perform compulsory military service); Peroni, *supra* note 139, at 681 (noting that pacifism is understood as the manifestation of a belief for Jehovah's Witnesses because pacifism is recognized as serving a seminal place in the belief system of Jehovah's Witnesses); *see also* Edge, *supra* note 11, at 361–62 (examining the sociological strategy of courts in looking at practices of others to define belief systems and their manifestation).

150. *See* Human Rights Council Res. 6/37, U.N. Doc. A/HRC/RES/6/37, ¶¶ 8, 9(k) (Dec. 14, 2007) [hereinafter HRC 6/37] (referring to Article 18 of the International Covenant on Civil and Political Rights as well as the 1981 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*).

151. *See id.* at 2 (stating in the preamble that the organization is "seriously concerned at all attacks upon religious places, sites and shrines in violation of international law, in particular human rights and humanitarian law, including any deliberate destruction of relics and monuments"); *see also, id.* ¶ 9(e) (urging states "to exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights and humanitarian law, to ensure that religious places, sites, shrines and symbols are fully respected and protected and to



and cultural significance, but also because these areas are linked to the group's dignity and existence.

A lingering and important question is how the human right to freedom of religion or belief assists in protecting sacred space in a practical sense. Many of the problems relating to sacred space protection occur in times of unrest or warfare,<sup>152</sup> when asserting a human right to freedom of religion or belief does not usually provide meaningful protection until it is too late. And, as discussed *supra*, cultural heritage protection during warfare is somewhat weak and generally applies *ex post facto*. Other instances involve individuals and groups, such as unrecognized minority groups, whose needs might be difficult to espouse or claim. What benefit will actually accrue, in practice, by referring to the human right to freedom of religion or belief as a basis for sacred space protection, beyond just making assertions that the right can be relied upon for protection or, worse, has been violated?

One answer is that the recognition of the human right to freedom of religion or belief may bolster a constructivist approach to human rights and the socialization of international human rights in a domestic system, which will create a form of protection for sacred space. A cosmopolitan approach towards sacred space protection may fit in well with current approaches towards the international process. Groups and individuals beyond the state may have a key role to play in developing norms and entrenching ideals within the state,<sup>153</sup> thereby actualizing forms of human rights protection in a more effective manner.

## VI. SOCIALIZATION OF HUMAN RIGHTS

The socialization of human rights refers to international human rights norms developed by international organizations, non-governmental organizations, domestic actors, and groups or individuals that eventually lead to change and acceptance of human

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take additional measures in cases where they are vulnerable to desecration or destruction"); Human Rights Council Res. 14/11, U.N. Doc. A/HRC/RES/14/11, ¶ 5 (June 23, 2010) ("call[ing] upon States to adopt measures and policies to promote respect for places of worship and religious sites").

152. See, e.g., RON HASSNER, WAR ON SACRED GROUNDS 1 (2009) (noting that "many sacred places have a history of extreme violence and bloodshed").

153. See, e.g., Matthew Davies, *The Perils of Incoherence: ASEAN, Myanmar and the Avoidable Failures of Human Rights Socialization*, 34 CONTEMP. SE. ASIA 1, 1 (2012) (noting that the lack of coherent policy by ASEAN towards Myanmar resulted in a weakened influencing effect on Myanmar's human rights policies).

rights within a state and society therein. While social constructivist scholars recognize the importance of international legitimacy between states as a form of influential currency, they also adopt an ideational approach that centers on the importance and use of the idea of human rights as grounds for fomenting change. The shift towards processes beyond the traditional international process is largely due to the different emphasis of human rights as being dependent on the state making changes within its own territory, rather than involving a cross-border issue with another state or states, and because human rights are easily subject to the whims and fickle changes of state interests.<sup>154</sup>

The focus of constructivists in the human rights context is on the moral strength of human rights ideas and the role of non-state actors, such as nongovernmental actors or international organizations, in influencing states' decisions to comply with universal human rights norms.<sup>155</sup> Because relations between different international and domestic actors are linked to institutional constructs, such as treaty based processes or international and regional organizations, the socialization approach emphasizes notions like legitimacy given the inherent structural constraints embedded in the system that demand a state act in a certain manner. The turn to legitimacy, however, is coupled with forces emerging from ongoing discourse and human rights norms that assist to shape the actions of states, such that a social constructivist approach provides the stages and processes through which human rights norms become "socialized" into domestic settings. These forces exist from within the state, such as from a domestic social movement or particular religious group making a claim to a sacred space, or from outside the state, such as transnational social networks or treaty bodies that pressure the state to act in accordance with the human right to freedom of religion or belief.

By allowing for the inculcation of human rights norms within a domestic context, the state may change to allow human rights protections to take root in the state.<sup>156</sup> Relying on the human right to

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154. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 628–29 (2004).

155. See, e.g., Brian Greenhill, *The Company You Keep: International Socialization and the Diffusion of Human Rights Norms*, 54 INT'L STUD. Q. 127, 129 (2010) (arguing international governmental organizations better influence states' human rights practices through the socialization process as opposed to the traditional methods of punishment and coercion).

156. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 2 (Thomas Risse et al. eds., 1999).

freedom of religion or belief to protect sacred space, for example, can allow for the inculcation of such norms and protections in society and the state, with a view towards providing protection pursuant to the actual needs of religious communities during peace and possibly having such embedded protection carry over even during wartime. Socialization as an approach towards human rights protection is especially useful in instances where the reliance on freedom of religion will not lead to a judicial challenge, because the state might not have consented to international judicial oversight or does not provide the means for judicial involvement. Yet the right can serve as part of the ongoing use of ideas and international norms as challenges to, and part of the language of, actors making the claim for human rights protection.<sup>157</sup> As different stages of socialization emerge, be it through legal changes, argumentation and persuasion, ongoing dialogue, or strategic bargaining, reliance on the human right to freedom of religion as grounds for protecting sacred places can take root in the state and society. Actors within a state are constantly shaping their identity and perceptions pursuant to internal and external forces, including other states, transnational actors, and domestic groups espousing ideals that are important to them.<sup>158</sup>

Risse and Sikkink describe a socialization process that can be rather telling for relying on the human right to the freedom of religion or belief as grounds for protecting sacred space specifically because they rely upon non-state actors to define and apply the right. Governmental policies are not solely driven by domestic actors, but also by non-state transnational actors like NGOs, including religious organizations, and international organizations and treaty bodies who sway and influence the state. These actors can apply normative pressure on states through shaming and denunciation.<sup>159</sup> While the first state response to such pressure might be empty rhetoric or minor

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157. Indeed, part of the problem in relying on judicial challenges is their *ex post facto* nature, where damage to a holy site will be difficult to undo. Inculcating the norm into the discourse allows for a firmer and stronger basis of protection.

158. See generally Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224, 224–25 (1991) (exploring how one's concept of self develops both independently and interdependently of others depending on one's cultural background).

159. See, e.g., KATRIN KINZELBACH & JULIAN LEHMANN, CAN SHAMING PROMOTE HUMAN RIGHTS?: PUBLICITY IN HUMAN RIGHTS FOREIGN POLICY (2015), [http://www.gppi.net/fileadmin/user\\_upload/media/pub/2015/Kinzelbach\\_Lehmann\\_2015\\_Can\\_Shaming\\_Promote\\_Human\\_Rights.pdf](http://www.gppi.net/fileadmin/user_upload/media/pub/2015/Kinzelbach_Lehmann_2015_Can_Shaming_Promote_Human_Rights.pdf) (concluding that when implementing shaming practices, strategic and coordinated action between NGO groups and state actors is essential for effective outcomes).

reactions to the asserted human rights norms,<sup>160</sup> the moral power of the norms can become further enmeshed and binding over time. Thus, universal human rights norms achieve stronger prescriptive status as they enter the discourse with the state, become further internalized in the legal system, and begin to guide state behavior. Such instrumental adaptation, where a government might respond to internal and external pressures from actors making human rights claims under the guise of human rights treaties,<sup>161</sup> can allow for greater forms of religious freedom, at least as an inroad towards protecting sacred spaces.<sup>162</sup> This is especially true if the claims derive from a minority group. Granted such adaptation and discourse can—and should—occur in the cultural heritage context as well, yet operating within the domain of freedom of religion or belief provides a more incisive and focused form of protection that incorporates relevant actors and provides more avenues for inculcation. Such an approach is evidenced in the 2014 Report of the Special Rapporteur for Religious Freedom where Special Rapporteur Bielefeldt called on religious leaders to challenge extremists groups and their views and to share the importance of tolerance and respect of the rights of others.<sup>163</sup>

As the norm becomes part of the discourse and the state becomes accustomed to assertions by religious groups for sacred space protection, groups convey information about which sacred spaces merit protection and clarify what form of protection is sought.<sup>164</sup> Further, a group can lay claim to more specific and particular forms of protection for sacred spaces, like indigenous people making claims to sacred

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160. Pedro Pizano, *The Power of Naming and Shaming*, FOREIGN POL'Y (Aug. 5, 2014), <http://foreignpolicy.com/2014/08/05/the-power-of-naming-and-shaming/> (discussing the lasting and positive impact on China, particularly given China's protestations, when Congress renamed a Washington, D.C., street where the Chinese Embassy was located after a famous Chinese dissident).

161. Risse & Sikkink, *supra* note 156, at 12.

162. See Christopher Marsh & Daniel P. Payne, *The Globalization of Human Rights and the Socialization of Human Rights Norms*, 2007 BYU L. REV. 665 (2007) (discussing the impact of the formal acceptance of the Universal Declaration of Human rights on norms of religious freedom around the world).

163. See Heiner Bielefeldt, *Rep. of the Special Rapporteur on freedom of religion or belief*, ¶¶ 103–06, U.N. Doc. A/HRC/28/66 (Dec. 29, 2014) (calling on religious communities to act swiftly to stop acts of violence by religious extremists against groups, individuals, and places of worship).

164. Marsh & Payne, *supra* note 162, at 675 (noting the emergence of the freedom of religion in different states and regions as a result of the right becoming part of the subjective understanding of culture); see also *id.* at 680 (asserting socialization requires both enculturation of norms as well as legal acceptance of same).

spaces outside the context of western property rights. Actors will form their own collective identity as a means of shaping their interests and scope of protection to be accorded to a sacred space.<sup>165</sup> The legal system is not the only means for effectuating this change. Relying on the human right to freedom of religion internalizes the norm, validates reliance on it as part of accepted discourse, and leads to a form of institutionalization of it within the state<sup>166</sup>—all of which open up avenues for sacred space protection.

Demanding the international human right to freedom of religion or belief engages the gamut of human rights protection processes, including a targeted state focus and naming and shaming approaches. The presumption is that the state will have an internal social mobilization process, whereby local actors and activists become more emboldened in relying on human rights and states, in turn, recognize the validity of human rights norms.<sup>167</sup> The state engages in dialogue that incorporates human rights norms as part of the usual form of ongoing discourse.<sup>168</sup> Human rights norms then also can be mobilized to become a part of the legislative framework, allowing for a form of internal institutionalized entrenchment and possible challenges to take place.<sup>169</sup>

Socialization recognizes the role of domestic and transnational actors to engage in political transformations through discourse and pressure, and improve internal domestic structures with a view towards stronger entrenchment of human rights.<sup>170</sup> Included in the various benefits of socialization of human rights norms is the mobilization of domestic opposition to states not adhering to human rights standards, which is achieved by the incorporation of the voices of NGOs, social movements, and international organizations acting to

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165. Risse & Sikkink, *supra* note 156, at 14; Marsh & Payne, *supra* note 162, at 678 (noting the importance of recognizing the different social and historical contexts in which religious freedom emerged as but one avenue for addressing the matter of relativism in human rights).

166. Risse & Sikkink, *supra* note 156, at 17; Goodman & Jinks, *supra* note 154, at 626 (highlighting the distinctiveness of the acculturation process—as opposed to coercion and persuasion—as the former allows for states to adopt the perceptions and patterns of surrounding cultures).

167. Risse & Sikkink, *supra* note 156, at 25–26.

168. *Id.* at 28; Marsh & Payne, *supra* note 162, at 667 (referring to this as a form of strategic bargaining).

169. Risse & Sikkink, *supra* note 156, at 29–30.

170. *Id.* at 4; Goodman & Jinks, *supra* note 154, at 626 (referring to this stage as the acculturation of rights).

uphold human rights.<sup>171</sup> Thus, rather than get caught up in an interest-oriented framework centered on economics, military capacities, or other forms of power influence, socialization favors existing communicative processes that define state interests at stake and uses this understanding to influence state preferences and political decisions.<sup>172</sup> The human right to freedom of religion or belief provides a foundationally relevant normative context and a firmer basis to protect sacred space. This is opposed to cultural heritage protection that entails a broader swath of actors and incorporates a host of interests beyond just sacred property, thereby making protection of an important sacred site more difficult.

Socialization of human rights norms is important for sacred space protection, as the latter is largely driven by unrecognized groups or groups that should determine what should be protected according to their beliefs. In the cacophony of voices present in the cultural heritage framework, with its state-driven inclination and broader worldview, the focus on sacred space protection might be diminished.<sup>173</sup> The human right to freedom of religion or belief personifies a form of collective expectation for various groups pursuant to the claims being made to actually protect and/or make use of different sacred spaces, even when not specifically demanded as a form of manifestation of a belief.<sup>174</sup>

Granted that the socialization process is beset by what appears to be an over-deterministic—and possibly over-idealistic—argument, especially accounting for different forms of state reactions to the socialization of human rights norms.<sup>175</sup> The social

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171. Risse & Sikkink, *supra* note 156, at 5; Marsh & Payne, *supra* note 162, at 668 (noting that the capacity to raise the “moral” consciousness of states and engage in argumentation and persuasion is largely driven by domestic actors within a state).

172. Risse & Sikkink, *supra* note 156, at 7; Marsh & Payne, *supra* note 162, at 667 (noting that this is a form of institutionalization and habituation of state behavior).

173. FORREST, *supra* note 31, at 235 (noting the WHC’s shift towards broad themes that shy away from sacred space, like human settlement, subsistence, and movement).

174. See generally Marsh & Payne, *supra* note 162, at 675 (discussing the human right to the freedom of religion or belief).

175. Eran Shor, *Conflict, Terrorism, and the Socialization of Human Rights Norms: The Spiral Model Revisited*, 55 SOC. PROBS. 117, 118 (2008); Marsh & Payne, *supra* note 162, at 668 (noting the overly-linear and teleological bent of the socialization argument).

environments of states radically differ<sup>176</sup> and social norms tend to be more diffuse and complex.<sup>177</sup> Policies and reactions of states will depend on the context and existing political and legal framework of the state, particularly under the human right to freedom of religion, where a religious group might be threatening to the state or the state desires to entrench a particular favored group. Indeed, states might react differently to assertions of sacred space protection based on the human right to freedom of religion. Some may retract protection of such sites, especially when considering the overlay of state security interests and the presumed need to address religious extremism by constricting the right to freedom of religion.<sup>178</sup> Security issues and presumed threats from a religious group will influence a state's willingness to accord any weight to a religious group's needs.<sup>179</sup>

Nonetheless, it is important to remember that the connection between religion and extremism is somewhat misplaced; the rush by states to quell religion because it has been linked to radical elements that espouse violence and social upheaval can be called into question. Recent studies have indicated that religious organizations can actually play a constructive role in limiting conflict and enhancing peace building.<sup>180</sup> Instead of a zero-sum game between religious freedom and security, repressing religion actually creates greater insecurity in the state while, conversely, supporting religious freedom promotes social stability and long-term security in the state.<sup>181</sup> Thus, states' suppression of religion increases social tension while, at the same time,

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176. Goodman & Jinks, *supra* note 154 (noting the need to account for different social environments of states when considering the coercive approach to create change).

177. *Id.* at 665–67, 678–81, 693–95 (noting the weakness of the persuasive approach when considering the variety of diffuse social norms).

178. *Cf.* International Covenant on Civil and Political Rights, *supra* note 123, art. 18(3) (noting that the reliance on national security as a human rights limitation under the aegis of the international human right to freedom of religion or belief is not a provided for limitation under the right).

179. Silvio Ferrari, *Individual Religious Freedom and National Security in Europe after September 11*, 2004 BYU L. REV. 357, 363 (2004) (tracing the impact of September 11 and other religiously motivated terrorist attacks on how governments treat religious groups).

180. *See, e.g.,* Jeffrey Haynes, *Religion and International Security*, in RELIGIOUS TRANSNATIONAL ACTORS AND SOFT POWER 59, 59–76 (2012) (illustrating the positive impact that religious actors can have in conflict resolution using case studies from Mozambique, Nigeria, and Cambodia).

181. Chris Seiple & Dennis R. Hoover, *Religious Freedom and Global Security*, in THE FUTURE OF RELIGIOUS FREEDOM: GLOBAL CHALLENGES 315, 316 (Allen D. Hertzke ed., 2015).

radicalizing the targeted group,<sup>182</sup> leading to an ongoing cycle of religious violence.<sup>183</sup>

By contrast, allowing for religious liberty and “principled” pluralism promotes greater stability and loyalty to the state.<sup>184</sup> In states espousing a secular framework, such as the United States and most European nations, the attempt to “re-formulate” religion<sup>185</sup> was more effective than attempts to engage religious actors in military operations or impose severe restrictions on religious groups. Indeed, such complex interactions between the state and society concerning religion result in sounder policy that would account for the complexities of the security-religious freedom relationship and not automatically try to inhibit religious freedoms of a particular targeted group.<sup>186</sup> Furthermore, the state is not the sole central figure in the security-religious freedom interaction, as other societal members play a pivotal role and should be accounted for as well.

Additionally, a strategic link between human rights interests and security interests in foreign policy measures could arguably increase security through the strengthening of human rights, rather than rely solely on a balancing between the two.<sup>187</sup> Given the correlation between human rights abuses, usually on the basis of national security, and the penchant for aggressiveness by states engaged in human rights violations, it would seem like a wise move for states to create stronger linkages between human rights and security—where human rights protections are actually heightened—as grounds for long-term alleviation of aggressive positions by states.<sup>188</sup> The socialization process can serve as a strong

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182. *Id.* at 318–20 (examining the unintended repercussions of state suppression of particular religious groups).

183. See, e.g., Roger Finke & Jaime D. Harris, *Wars and Rumors of Wars: Explaining Religiously Motivated Violence 1* (Jan. 8, 2009) (unpublished manuscript) (on file with the Association of Religion Data Archives), <http://thearda.com/workingpapers/download/War%20and%20Rumors%20of%20War.pdf> (exploring direct and indirect impacts that government actions have on religiously motivated violence).

184. Seiple & Hoover, *supra* note 181, at 12.

185. See ROBERT M. BOSCO, *SECURING THE SACRED: RELIGION, NATIONAL SECURITY, AND THE WESTERN STATE* 30 (2014) (noting the Bush Administration’s post-September 11 attempt to distinguish between the “real” religion of Islam as opposed to the radical ideologies that were emerging from Islam).

186. KAREN MURPHY, *STATE SECURITY REGIMES AND THE RIGHT TO FREEDOM OF RELIGION AND BELIEF: CHANGES IN EUROPE SINCE 2001*, at 206 (2013).

187. *Id.* at 207.

188. See generally William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249 (2004) (challenging



ground for fomenting such approaches and cementing the important ideals that have been developed by the international human rights system.

### CONCLUSION

This Article has focused on sacred space protection in a manner that addresses the actual needs of groups calling for such protection. The cultural heritage protection framework might provide some in-road towards sacred space protection but, in many ways, it is practically ineffective for sacred space protection. Cultural heritage protection involves state-centric methods that are driven by broad-form concerns linked to specific processes. Reliance upon the international human right to freedom of religion or belief, however, can better serve the needs of groups desiring to protect and utilize their sacred space. The human right to freedom of religion or belief opens up avenues for group assertions regarding sacred space protection, especially in light of broader understandings of the right. Ongoing reference to the human right to freedom of religion or belief further entrenches the right and allows for better acculturation of the norm, leading to greater acceptance of normative protection for sacred areas. The socialization of the norm allows for protection and preservation of venerated areas to ensue pursuant to the needs of different groups.

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the assumed tension in U.S. foreign policy between promoting human rights and protecting national security and arguing for a larger human rights role in U.S. foreign policy).