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UNESCO and the Preah Vihear Dispute: Challenges Facing Cosmopolitan Minded  
International Institutions in Dispute Resolution

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Abstract:

The thesis examines the border dispute between Thailand and Cambodia over the Temple of Preah Vihear that was ignited when the site was inscribed on the UNESCO World Heritage List in 2008. The principle research question asked is why did the involvement of an international organization, with a cosmopolitan mandate to preserve the universal heritage of mankind and promote peaceful relations between member states, result in an intermittently violent border dispute that the UNESCO been unable to successfully mediate?

The thesis first describes UNESCO, the World Heritage Convention, and the World Heritage Actors constituent parts of a “cosmopolitan international organization” that is tasked with advancing a cosmopolitan normative agenda according to a Kantian federation of states model. It then presents the Preah Vihear dispute by focusing on the creation of the Thai-Cambodian border during the French colonial period, the legal dispute about the temple that was argued before the International Court of Justice following Cambodian independence, and the current crisis triggered by the addition of the site to the World Heritage List. The final section argues that the normal technical/legal logic used by international organizational actors is unable to resolve fundamentally political disputes, and in the case of Preah Vihear it further aggravated the crisis and prompted a Thai backlash against the whole World Heritage cosmopolitan project.

The thesis concludes by saying institutional actors seeking cosmopolitan outcomes need to take responsibility and initiative to go beyond legal interpretations in order to craft viable political solutions to political disputes.

Keywords: UNESCO, World Heritage, Preah Vihear Border Dispute, Conflict Resolution, Cosmopolitanism

## **Contents**

Introduction .....	1
Chapter I: Profile of a Cosmopolitan International Organization.....	4
UNESCO as a Cosmopolitan International Organization .....	4
Cosmopolitan Rulemaking: World Heritage Convention .....	9
The Institutional Actors in World Heritage .....	12
States Parties: .....	13
The World Heritage Center.....	15
Advisory Bodies .....	17
Chapter II: Anatomy of a Border Dispute .....	22
Preah Vihear and the Franco-Siamese Border Treaties.....	24
The Road to Creating the Temple of Preah Vihear World Heritage Site .....	30
In the Streets: Aftermath of the Inscription and Current Crisis .....	37
Chapter III: Legal Logics and Political Disputes, the Need for Flexibility .....	43
Legal/Technical Framework and a Political Dispute .....	43
UNESCO and the World Heritage Community as a Forum for Mediation .....	50
Cosmopolitan Civil Society Coordinating Cosmopolitan Political Solutions .....	53
Conclusion.....	59
Bibliography .....	63

## Introduction

In the spring of 2011, Thailand and Cambodia seemed to be slipping towards a full scale border war. The simmering conflict finally exploded as Thai and Cambodian military forces started exchanging artillery and heavy weapons fire across a 150 mile zone. Amidst Security Council deliberations and attempts by ASEAN to negotiate a ceasefire, the world's media rushed to explain why.

The answer seemed beyond belief. Since 2008, Thai-Cambodian relations deteriorated and armed confrontation escalated, not over some grand issue of national survival, but because of a disputed claim to 4.5 square kilometers surrounding a thousand year old temple named Preah Vihear following its inscription to the UNESCO World Heritage List. Both states had agreed to support this inscription, recognized the need to preserve the site, and counted on using the site as part of a heritage tourism economic development strategy, and yet here they were fighting. The nadir came during the July 2011 World Heritage Committee meeting when, following a successful ASEAN brokered ceasefire, the World Heritage Committee saw Thailand renounce its committee position and storm out of the conference. Observers wondered why UNESCO had been so foolish to inscribe this disputed site and bemoaned its inability to resolve the chronic violence between two World Heritage Committee members.

The Preah Vihear dispute is particularly troubling because it unfolded within an international institutional framework based on cosmopolitan values specifically designed to promote peaceful cooperation and concerned an issue, heritage preservation, that shouldn't be politically contentious. How is it that the worldwide network of experts and 190 states that committed to helping preserve World Heritage according to the mechanisms established in



the World Heritage Convention couldn't effectively help Thailand and Cambodia out of their impasse?

This thesis aims to answer these questions. The case of Preah Vihear is being examined as an example of institutional failure. Specifically how and why an institutional arrangement that binds the world's states and segments of civil society interested in heritage preservation together with a mandate to protect World Heritage sites not only failed to resolve the conflict around Preah Vihear, but instead aggravated an already longstanding dispute. The primary focus is less on the multi-lateral mechanisms created by the World Heritage Convention, than how the various World Heritage actors use those mechanisms when interacting with each other. The major contention of the thesis is that the success of a cosmopolitan institution is less related to its internal legal architecture and primarily dependent on the actions and energy of the actors tasked with realizing its normative project.

Chapter one presents the concept of a cosmopolitan international organization, and presents UNESCO as a real-world example of the concept. The World Heritage Convention is presented as an example of a cosmopolitan regulatory framework, and the three principle World Heritage actors and their roles in achieving the cosmopolitan objective of World Heritage preservation are presented. Chapter two presents the Temple of Preah Vihear dispute in detail, from the delineation of the Thai-Cambodian border during the French colonial period up through the territorial disputes surrounding the inscription of the temple as a World Heritage Site. Chapter three analyses the institutional failure by using the dichotomy between political and legal disputes developed by realist E.H. Carr.<sup>1</sup> International law is based on a general political consensus. If two disputing states accept the consensus, then a dispute can be settled through legal mechanisms. If, as in the case of Preah Vihear, a state

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<sup>1</sup> E.H. Carr, *The Twenty Years' Crisis*, New York, Palgrave MacMillan, (Michael Cox introduction 2001/1981).

contests that status-quo, then not only does the application of legal logic fail to resolve the dispute, it provokes a reaction against the whole of the legal structure. This is the principle explanation for why the actions of the World Heritage Committee and International Court of Justice have served to aggravate rather than resolve the dispute.

The goal of this analysis is to illustrate the difficulties facing any international institutional arrangement that seeks to promote cosmopolitan values. Preah Vihear is examples of a conflict that all involved actors agree is tragic, but that none have succeeded in resolving despite the existence of elaborate mechanisms to prevent and mediate this kind of conflict. Hopefully it can serve to bring increased light to the issue and prove instructive to future cosmopolitan projects in international affairs.

## **Chapter I: Profile of a Cosmopolitan International Organization**

### **UNESCO as a Cosmopolitan International Organization**

International cosmopolitanism is a normative theoretical position in international relations that advocates for a world order that affirms the personal dignity of every individual and protects their individual human rights. While international cosmopolitans come in many shapes and varieties, all share core normative beliefs that Richard Beardsworth calls the “cosmopolitan disposition.”<sup>2</sup> First, all individuals are seen as part of a single global community and share in basic cosmopolitan rights regardless of international borders, class, race, gender, and other artificial social boundaries. It is therefore necessary to codify cosmopolitan laws and regulations to protect these rights. Since states and wars between states are frequent violators of these rights; an effective system of international governance needs to be established that constrains state behavior within a framework of international law and regulation.<sup>3</sup>

The most straightforward way of creating this system would be to have a single global supranational authority that would create and enforce these global standards. However, cosmopolitan theory tends to be ambivalent to this kind of solution because it would in essence be the creation of a global state, and thus susceptible to the same kind of tyrannical abuses that can happen in classic states. Immanuel Kant’s essay on perpetual peace provides the basis of current cosmopolitan thinking about how to structure a system of cosmopolitan governance while preserving the principle of self determination. Instead of a single global government a forum containing all of the world’s states is established to collectively create

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<sup>2</sup> Richard Beardsworth, *Cosmopolitanism and International Relations Theory*, Cambridge, Polity Press, (2011) pg.16-46.

<sup>3</sup> Ibid, 20.

and enforce laws that bind states to defend fundamental individual rights.<sup>4</sup> The key criterion is that these states be “republican,” which is to say they reflect the will of their population and are legally bound to respect the fundamental human dignity of both their citizens and foreign nationals. These republican states serve a dual purpose. They both separate power to create cosmopolitan law between themselves to prevent the emergence of a tyrannical supranational force while they apply cosmopolitan rules in their territories.

The great cosmopolitan revolution of international relations was the creation of the modern United Nations system that not only enshrined cosmopolitan principles of human rights as the *raison d'être* of post-war international organizations, but as a unbreachable requirement for all states in international law. Prior to 1945, international organizations and international law uniquely governed the conduct and responsibilities of states in relationship to other states. Starting with the *United Nations Charter* and the *Universal Declaration of Human Rights*, protecting the fundamental dignity of the human person was established as the core principle and legal requirement of the post-war international order. This new breed of international organization that bases its legitimacy on a cosmopolitan normative vision of individual human rights is what this thesis refers to as a “cosmopolitan international organization.”

The United Nations Educational, Scientific, and Cultural Organization is one of the multitude of these organizations that has developed since 1945. This chapter focuses on how UNESCO’s cosmopolitan normative mission is defined in its governing documents and how a system of global governance to protect the outstanding cultural and natural heritage of mankind was constructed to realize the normative ambition on the ground. UNESCO’s

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<sup>4</sup> Immanuel Kant, “Perpetual Peace: A Philosophical Sketch,” *Mount Holyoke College online* (1795), accessed online February 5<sup>th</sup>, 2013, <https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm>.

mission as a Kantian cosmopolitan international organization is clearly reflected in the preamble to the organization's constitution.<sup>5</sup>

*"The Governments of the States Parties to this Constitution on behalf of their peoples declare:"*

The sentence above affirms two principles. First, UNESCO is an organization of states and states are the only actors on the international level that are competent to create international rules and law. Second, the states make it clear that the states are acting as the agents of their peoples. UNESCO may be made up of states but it exists to serve the interest of the peoples of the world. All state members are therefore accepting their "republican" role to transmit the will of their people to the international level.

*"That since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed;*

*That ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war;*

*That the great and terrible war which has now ended was a war made possible by the denial of the democratic principles of the dignity, equality and mutual respect of men, and by the propagation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races;"*

This is the quotation most frequently associated with UNESCO and comes from a profoundly cosmopolitan perspective. Rather than being the cause of political forces, economic competition, or balance of power, war's cause is described here as coming from the individual level when people embrace arbitrary divisions, resentments, and hostilities

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<sup>5</sup> UNESCO, "Constitution of the United Nations Educational, Scientific, and Cultural Organization," in *Basic Texts*, UNESCO, Paris, (2012), pg. 5-19. <http://unesdoc.unesco.org/images/0021/002161/216192e.pdf#page=7>.

amongst individuals and groups. Therefore the role UNESCO is to build the foundation for peace in the minds of individuals.

*“That the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfill in a spirit of mutual assistance and concern;*

*That a peace based exclusively upon the political and economic arrangements of governments would not be a peace which could secure the unanimous, lasting and sincere support of the peoples of the world, and that the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind.”*

UNESCO defines here the organization’s specific purpose and normative vision within the international system. The focus is on promoting individual human rights and creating a worldwide sense of shared humanity and solidarity. The use of the term “education of humanity” underlines the sense that cosmopolitan ethics won’t necessarily propagate on their own, and therefore UNESCO must—in order to actively support a cosmopolitan vision for the future of human relations if those values were to become widespread.

*“For these reasons, the States Parties to this Constitution, believing in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge, are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the purposes of mutual understanding and a truer and more perfect knowledge of each other’s lives;*

*In consequence whereof they do hereby create the United Nations Educational, Scientific and Cultural Organization for the purpose of advancing, through the educational and scientific and cultural relations of the peoples of the world, the objectives of international peace and of the common welfare of mankind for which the United Nations Organization was established and which its Charter proclaims.”*

UNESCO's marching orders and specific role within the United Nations system are here in black and white. Its objective is to facilitate the cultural, intellectual, and educational exchanges amongst the world's peoples. While the United Nations and its other specialized agencies focus on power relations, economic exchanges, and technical cooperation between states, UNESCO is the agency that promotes and educates universal human rights and values at national, regional, local, and individual levels.

While the preamble to UNESCO's constitution articulates a cosmopolitan normative orientation, but this wouldn't be enough for UNESCO to be a cosmopolitan organization along Kantian lines. The association must also be universal in reach and must actually contain states that represent the popular will. In terms of membership, UNESCO has grown from 37 Member States in 1945 to 195 in 2012, giving it the widest membership of any international organization and achieving effective universal inclusion of all states.<sup>6</sup> Are these states republican? The short answer is no. There are plenty of member states that are dictatorships, single party systems, and other non-representative forms of government.

Yet even these states cannot overtly oppose UNESCO's cosmopolitan democratic orientation. The official names of the People's Republic of China and the Islamic Republic of Iran illustrate that even states viewed by the west as deeply undemocratic still operate in an international normative environment that demands all states to be nominally republican. Furthermore, by joining UNESCO, all members become effectively obligated by a sort of inter-state peer pressure, to publically embrace UNESCO's rhetoric of universal human equality and rights. Even non-republican states within UNESCO must conform to a nominal

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<sup>6</sup> UNESCO, "Communities: Member States," *UNESCO.ORG*, UNESCO, Paris, accessed 10/30/2012. [http://portal.unesco.org/en/ev.php-URL\\_ID=11170&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=11170&URL_DO=DO_TOPIC&URL_SECTION=201.html) By comparison, the United Nations counts 193 Member States. Palestine is the newest and most controversial, non-UN UNESCO Member State, but UNESCO also counts the Cook Islands and Niue, both associated states of New Zealand, as members.

extent with the cosmopolitan ethics of UNESCO's "anarchical society."<sup>7</sup> Over the long term UNESCO's normative framework and rhetoric is probably pushing all its member states to behave closer to the Kantian republican ideal. A final piece of evidence is UNESCO's official rhetoric that tries to position the organization as the leading bastion of humanistic concerns in the international environment.<sup>8</sup>

### **Cosmopolitan Rulemaking: World Heritage Convention**

While the constitution of UNESCO defines the general structure and cosmopolitan ideals of the organization, the actual mechanism for defining cosmopolitan norms and constraining state behavior is the international convention. These are multi-lateral agreements between member states where the signers agree to adhere to community norms of behavior in the particular convention's area of competence. While all international conventions place primary responsibility for implementation and compliance with each national government, many conventions feature governing bodies comprised elected signatory states, a secretariat staffed by bureaucrats from the international organization, and advisory N.G.O.s. These supranational, or cosmopolitan, institutional actors review compliance with the convention and can sanction non-compliant states.

UNESCO Member states have created 29 conventions covering a broad spectrum of activity, from copyright protection and mutual recognition of higher education degrees to environmental protection and anti-doping in sport.<sup>9</sup> The universality and impact of each convention varies according to the number of states parties who have signed it. Only states

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<sup>7</sup> Headly Bull, *The Anarchical Society: a Study of Order in World Politics*, Palgrave, New York, 2002 3<sup>rd</sup> edition, (1977).

<sup>8</sup> Irina Bokova, *A New Humanism for the 21<sup>st</sup> Century*, Paris: UNESCO (2010). Accessed 2/4/2013 <http://unesdoc.unesco.org/images/0018/001897/189775e.pdf>

<sup>9</sup> UNESCO, "Conventions," *UNESCO.ORG*, UNESCO, Paris, accessed 10/30/2012. [http://portal.unesco.org/fr/ev.php-URL\\_ID=12025&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=-471.html](http://portal.unesco.org/fr/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html).



that have ratified a convention are bound by it. However, even relatively poorly signed conventions still help codify international affairs by creating a point of reference and an “international standard” in their area of competence.

UNESCO’s *Convention concerning the Protection of the World Cultural and Natural Heritage* (World Heritage Convention) is the organization’s most well-known and successful convention.<sup>10</sup> Established in 1972, the World Heritage Convention currently has near universal acceptance, with 190 state party signatories. The convention formalizes the principle that certain heritage proprieties are cosmopolitan goods that need to be “preserved as part of the world heritage of mankind as a whole.”<sup>11</sup>

The convention text struggles constantly with the contradiction between the state as the actor with full sovereign rights over heritage sites that cannot be taken away on the one hand and the desire to create a universal standard for heritage preservation that all states are expected to live up to. The solution to this struggle was to create a World Heritage List that inventoried all the “outstanding” natural and cultural sites of the world. No state would be required to submit a site to the list, and only the owning state could bring a site forward for inscription, but the decision to include a site on the list and under what criteria would be made by the community of states in the form of the World Heritage Committee.

The Committee is comprised of 21 signatory states elected for six year terms by the general assembly of states parties to the World Heritage Convention.<sup>12</sup> States seeking to add sites to the list are directed to inventory all proprieties in their territory they deem possess Outstanding Universal Value (OUV). From this “tentative list,” the state submits a site

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<sup>10</sup> UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO.ORG, UNESCO, Paris, accessed 10/30/2012. [http://portal.unesco.org/en/ev.php-URL\\_ID=13055&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13055&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>11</sup> Ibid. Preamble

<sup>12</sup> Ibid.

nomination file to the World Heritage Committee for evaluation. The committee evaluates the nomination, on the basis of committee developed universal criteria, and determines if a site meets the requirements for inclusion. The committee is also required to publish the “List of World Heritage in Danger;” sites that are deemed to be threatened and in need of international assistance. Decisions are guided by the *Operational Guidelines for the Implementation of the World Heritage Convention*.<sup>13</sup>

These guidelines, largely drafted by the non-state world heritage actors, provide detailed criteria for establishing universal value, guidelines for site preservation and management, a process for inscription on the *World Heritage List* and the *List of World Heritage in Danger*, and a site de-listing process. Critically, the site’s management is deemed equally important by current guidelines as its universal value. If a site’s management or preservation is not deemed adequate by World Heritage Committee evaluations, inscription can be refused while previously inscribed sites can be removed from the list. This process gives the World Heritage Committee an enforcement role to ensure that states with World Heritage sites live up to the cosmopolitan standards for preservation.

However, the World Heritage Committee is in a paradoxical position. It is supposed to draft universal standards designed to best preserve humanity’s shared heritage and ensure that states live up to their responsibilities, yet the committee itself is a collection of states and is expected to defend the interests of all state parties in defending their sovereign prerogatives against supranational encroachment. The committee is also a political body. Countries are elected by their peers to represent certain policy interests and be helpful in securing inscriptions for their supporting blocks. It is for this reason that the World Heritage

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<sup>13</sup> World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UNESCO World Heritage Centre, Paris, (2011) accessed 10/30/2012. <http://whc.unesco.org/archive/opguide11-en.pdf>.

Convention created two cosmopolitan non-state institutional actors to moderate potential “politicized” behavior by the World Heritage Committee.

In sum, the World Heritage Convention is an example of an international legal arrangement whereby states agree to live up to international standards and submit to cosmopolitan supervision by cosmopolitan actors. States retain the monopoly of authority in issuing rules and decisions through the medium of the World Heritage Committee. Yet this same committee, along with UNESCO representatives and the global preservation community, provides cosmopolitan oversight to ensure that states fulfill their obligations.

### **The Institutional Actors in World Heritage**

This chapter has examined the legal framework and broadly cosmopolitan political project of UNESCO and the World Heritage Convention, but concrete action must be taken for the normative ambitions of the documents to be realized. In World Heritage successful implementation of the convention depends on the interaction of three broad institutional actors: the states parties, the World Heritage Center, and the advisory bodies. While the convention establishes roles and responsibilities for these actors, its success or failure depends on the concrete actions taken by the various players inside these instructional actors. 40 years of implementation have given rise to a fully-developed political culture between World Heritage actors complete with assumptions, biases, mistrusts, and traditions of interactions between actors that appear nowhere in the Convention text. This section

describes broadly the place each actor occupies in the World Heritage system and how they understand their role in it.

### **States Parties:**

The sovereign right to direct policy is kept by the States Parties to the World Heritage Convention. The states exercise their decision making authority during two forums. The General Assembly of States Parties to the World Heritage Convention unites all 190 signatories every two years during the sessions of UNESCO's General Conference. The General Assembly elects the 21 members of the World Heritage Committee.<sup>14</sup>

The World Heritage Committee meets once a year for two weeks, and makes specific policy decisions regarding the implementation of the convention. During the annual committee meetings, most of the "States Parties" to the convention send observer delegations. While these observer states can be given the floor by the committee and do participate heavily in side-room meetings and working groups, only the 21 committee members have the right to vote and participate fully in debates.

On paper the states are the most powerful of the three institutional actors, but their power is constrained by a lack of consensus between states, the immense workload experienced by national delegations to UNESCO, the inconsistency in personnel and a chronic lack of time to examine proposals.<sup>15</sup>

Taking the example of the United States, responsibility for representing U.S. interests in World Heritage is divided between the U.S. Department of State, providing the foreign policy expertise, and the National Park Service of the Department of the Interior, providing

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<sup>14</sup> Ibid. 1-7

<sup>15</sup> Personal observations at UNESCO and with the U.S. Mission to UNESCO, spring 2012.

the technical expertise in heritage preservation. Other than the two weeks during a World Heritage Committee meeting where personnel from both agencies directly work together as part of the U.S. delegation, these agencies work independently from each other. The NPS Office of International Affairs largely concentrates on preparing state of conservation reports and nomination files for U.S. sites during the course of a year, while the U.S. Mission to UNESCO covers all of the United States' various obligations at UNESCO.<sup>16</sup> Active preparation for a World Heritage Committee meeting can therefore be quite limited to other agency obligations. Finally, career federal employees, especially at the State Department, rotate through postings at regular 2-3 year intervals, effectively limiting the depth of institutional knowledge. These constraints apply to all States Parties; the United States brings to bear considerably more resources to its UNESCO efforts than most states, especially from the developing world.

Compounding the difficulty for states representatives is the growing bureaucratic complexity of World Heritage. Every year since 1976, the World Heritage Convention has met and made decisions inscribing sites, creating regulations, mandating actions, commissioning studies and so on. Newly rotating in diplomats, who generally have no prior experience with World Heritage, are confronted with this mass of legacy obligations from previous World Heritage Committee decisions. State delegations are therefore largely dependent on the World Heritage Center and Advisory Bodies for guidance on what issues need to be dealt with and how to deal with them.

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<sup>16</sup> National Park Service, *Office of International Affairs*, Department of the Interior, Washington D.C. (2012) accessed 10/30/2012. <http://www.nps.gov/oia/>. U.S. Department of State, *United States Mission to UNESCO*, U.S. Mission to UNESCO, Paris, (2012) accessed 10/30/2012. <http://unesco.usmission.gov/>.

On some level, state representatives are the big outsiders of the system. They may have final say on all decisions, but because of perpetual turnover they are always new at the game. Baring major efforts by specific states on specific issues, much of World Heritage runs on auto-pilot with the World Heritage Committee approving the decisions and recommendations of the World Heritage Committee and Advisory Bodies with little or no debate. All states tend to share a frustration with a system that is becoming increasingly complex, rigid, and opaque, all of which reduces the states' liberty of action in decision-making.

### **The World Heritage Center**

The World Heritage Center is the institutional force behind concretely implementing the World Heritage Convention according to the directives given by the States Parties. The 105 employees of the center are the only members of the three institutional actors that work full time on World Heritage issues. They organize all official meetings, receive all site evaluation reports, coordinate studies and working groups, and implement all budgeted and extra-budgetary programs.<sup>17</sup> This makes the World Heritage Center the primary information conduit for the system and gives the World Heritage Center enormous, if subtle, power in forming World Heritage policy.

A typical agenda for a two week World Heritage Committee meeting can easily include over 600 individual decisions. Frequently working documents are published fully only weeks before a meeting. Usually, all delegations from States Parties need significant authorization from their capitals to significantly change the content of working documents, which can easily take months for a full evaluation process. Therefore, other than areas of

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<sup>17</sup> World Heritage Committee, Ibid. pg 7-8.

high importance for a state, such as the inscription status of a particular site, the majority of the decision-making is effectively delegated to the World Heritage Center as the committee approves *en masse* the World Heritage Center's proposed decisions without debate or close examination. In areas of disagreement, time tends to favor the adoption of Center-proposed decisions, as the two week span of a committee meeting only allows for a very limited number of in-depth debates.<sup>18</sup> Even in cases where the Committee makes radical changes to draft decisions, States Parties are often dependent on the Center to draft the precise language of the new decision.

The information advantage enjoyed by the World Heritage Center is also heightened by the fact that most World Heritage Center personnel are drawn from the ranks of the wider UNESCO bureaucracy. Unlike the representatives of states, for whom UNESCO is an interesting temporary stop on a longer career, World Heritage Center employees, especially at higher echelons have deep roots at UNESCO. They have seen successive delegations come and go and know how to successfully advance their goals by outlasting initiatives they disagree with.

The cultural attitude of the World Heritage Center, along with that of the Advisory Bodies, differs from the representatives of the States Parties. Center employees view themselves as objective enforcer of World Heritage's cosmopolitan rules, and try to serve the needs of World Heritage sites. This is frequently expressed in a desire for equal application of rules and guidelines. It also means that the World Heritage Center spends much time "encouraging" states to live up to their agreed to obligations. Frequently, states disappoint, and a "politicized debate" and "politics" are the pejoratives most frequently used to describe states that are perceived to cheat the rules to gain a favored outcome, usually the listing of a

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<sup>18</sup> Personal observation and conversations 35<sup>th</sup> Session of the World Heritage Committee, Paris (July 2011).

site that was not originally recommended for inscription or the avoidance of a World Heritage in Danger designation.

At the same time, the Center is well aware of its limits. UNESCO and the World Heritage Center do not have capacity for independent action. The states must authorize all policy initiatives. Therefore the center must be politically astute enough to cultivate support for its preferred policies amongst States Parties and Committee members. The Center approach is pragmatic. It never tells; it suggests, recommends and otherwise influences the course of policy debates while reminding states that it is merely implementing the directives that they themselves authorized in prior Committee meetings. Overall, while there might be frictions on specific issues and specific sites, the World Heritage Center and Committee constructively work together to implement the goals of the World Heritage Convention.

### **Advisory Bodies**

Assisting the States Parties and World Heritage Center make the technical evaluations of sites are the three NGO advisory bodies ICCROM, ICOMOS, and ICUN. All three organizations share a similar mandate in the Operational Guidelines:

*“evaluation of properties nominated for inscription on the World Heritage List, monitoring the state of conservation of World Heritage ... properties, reviewing requests for International Assistance submitted by States Parties, and providing input and support for capacity building activities.”<sup>19</sup>*

The International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) was founded by UNESCO in 1956 and specializes in research and

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<sup>19</sup> Ibid, pg 9.



training for the preservation and restoration of cultural artifacts and proprieties.<sup>20</sup> Unlike the other two bodies, ICCROM does not participate in the evaluation of proprieties nominated to the list. ICCROM is the lead Advisory Body for cultural heritage preservation training efforts for sites in the context of the convention's international assistance mechanisms.

The International Council of Monuments and Sites (ICOMOS) was chartered by UNESCO in 1965 and represents the international community of archeological professionals.<sup>21</sup> ICOMOS evaluates the nominations of all cultural sites to the World Heritage list. International Union for the Conservation of Nature and Natural Resources (ICUN) is an association of conservationist groups that was founded in 1946. ICUN evaluates the nominations of all natural sites.<sup>22</sup> In the case of mixed proprieties, the ICUN and ICOMOS work together to prepare a joint evaluation.

While all three of the Advisory Bodies have a close relationship with UNESCO and its member states, they are entirely independent organizations. Membership is determined according to the professional standards set by each organization. All three organizations are subdivided into national chapters, which then combine to create the international governing body, but the governing process is internal to the professional organization. Neither the states parties nor UNESCO have the right to appoint individuals to leadership positions within the Advisory Bodies.

This independence extends to the Advisory Bodies' site evaluation missions. ICOMOS and ICUN independently select evaluation teams, review nomination files, conduct onsite visits, and prepare their final evaluations and recommendations. During actual

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<sup>20</sup>ICCROM, *International Centre for the Study of the Preservation and Restoration of Cultural Propriety*, ICCROM, Rome (2012), accessed 10/30/2012, <http://www.icrom.org/>.

<sup>21</sup>ICOMOS, *International Council on Monuments and Sites*, ICOMOS, Paris, accessed on 10/30/2012, <http://www.icomos.org/>.

<sup>22</sup> ICUN, *International Union for the Conservation of Nature and Natural Resources*, ICUN, Gland, accessed on 10/30/2012, <http://www.iucn.org>.

proceedings of the World Heritage Committee, advisory body evaluations are presented as wholly independent documents. In the event that the committee disagrees with a proposed decision, the advisory bodies help accommodate the committee's decision, but their original evaluation remains an independent part of the records of the World Heritage Committee.

The Advisory Bodies represent the global community of heritage professionals, and like the World Heritage Center, view their role as the defenders of the integrity of the World Heritage preservation system. They view themselves as performing “objective” and “scientific” evaluations based only on criteria defined by the operational guidelines. Like the World Heritage Center, States Parties tend to “politicize” the nomination process. Therefore, the Advisory Bodies highly prize their independence both in organizational structure and in their recommendations as they try to push states to live up their obligations set out in the convention.<sup>23</sup>

However, unlike the World Heritage Center, the Advisory Bodies' institutional independence means they tend to have a less pragmatic approach to dealing with states. In their mind they are the experts, they make objective evaluations based on the *Operational Guidelines*, and if a site is not meeting requirements they do not mince words in stating the deficiencies and delineating the steps a state should take to rectify the situation. There is an inherent tension between states and the Advisory Bodies over who determines if a state is in compliance with World Heritage preservation standards. States maintain the classic position that only states can judge if they are in compliance with international standards while the Advisory Bodies maintain that as the preservation professionals they are the only ones qualified to evaluate the status of a site.

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<sup>23</sup> Personal observation, 35<sup>th</sup> session of the World Heritage Committee, Paris, 2011.

The ambiguity is never really resolved in favor of one side or another. Both the states and the Advisory Bodies recognize the World Heritage Committee can accept or reject the proposed conclusions of the experts, but as a rule Advisory Body recommendations are accepted as presented. Committee decisions to change draft decisions frequently lead to contested votes amongst committee members and are considered justified under exceptional circumstances. It should be noted that states never directly question the Advisory Bodies' technical legitimacy and competence, but rather use claims that new information has suddenly come available that justifies a change to the proposed decision. States have therefore tacitly accepted that under normal circumstances the World Heritage Committee should defer to the opinion of the Advisory Bodies on matters of site evaluation. This understanding however doesn't stop individual states from energetically contesting Advisory Body conclusions that they disagree with.

In conclusion, UNESCO and the World Heritage Convention provide a laboratory to examine the challenges of advancing a broadly cosmopolitan normative vision of international relations using the instrument of an international organization of sovereign states. The goal of UNESCO is to preserve a peaceful world by developing "the moral solidarity of mankind." The structure is a Kantian association of legally equal sovereign states that, rhetorically at least, embrace the role of the republican state that represents the desires of its people. The tool chosen to advance the cosmopolitan mission is the international convention that binds state behavior around a set of community norms designed to protect universal human rights. With a 40 year operational history and effective universal

acceptance, the World Heritage Convention provides an opportunity to examine reality of how a cosmopolitan international organization operates.

The experience of Preah Vihear illustrates a failure of the cosmopolitan international organization to live up to its normative rhetoric. Both Thailand and Cambodia had committed to UNESCO's values and agreed to the universal value of the temple, and both states were sensitive to popular opinion concerning the issue. Yet despite the existence of a fully formed forum designed to encourage cosmopolitan solutions, the decision to include Preah Vihear in the World Heritage List resulted in a spiral of increasing tensions and border violence that the World Heritage Convention actors couldn't find a constructive response to. The next two chapters try to understand how and why this occurred.

## Chapter II: Anatomy of a Border Dispute

The Temple of Preah Vihear has been a part of the complex Thai-Cambodian relationship for 1000 years.<sup>24</sup> This chapter presents of the complex history of the Preah Vihear dispute. The first section focuses on the history of the temple in the context of the fluid political and border dynamics between Cambodia and Siam prior to and during the French colonial interventions of the late 19<sup>th</sup> century. The section examines how the current Thai-Cambodian border was drawn in this context of colonial expansion. The second section examines the legal dispute between Thailand and Cambodia following Cambodian independence from France that ultimately led to a 1962 International Court of Justice ruling awarding the temple to Cambodia but leaving the status of the territory around the temple ambiguous. The final section examines the evolution of the current diplomatic and political crisis brought on by the drive to inscribe the Temple of Preah Vihear as a World Heritage Site. This chapter tries to illustrate that neither side is clearly “right” or “wrong” in this matter. Both have legitimate claims based on a complex shared history. International attempts to adjudicate claims for one side or another only served to heighten, rather than resolve, tensions.

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<sup>24</sup> ICOMOS, “Preah Vihear, No 1224,” in *Évaluations des Biens Culturels WHC-08/32.COM/INF8B1.Add.2*, UNESCO World Heritage Committee, Quebec (2008), [http://whc.unesco.org/archive/advisory\\_body\\_evaluation/1224rev.pdf](http://whc.unesco.org/archive/advisory_body_evaluation/1224rev.pdf).



Figure 1: Temple of Preah Vihear perched on its high plateau with Thailand in the background. © ICOMOS, “Preah Vihear No 1224,” (2008).<sup>25</sup>

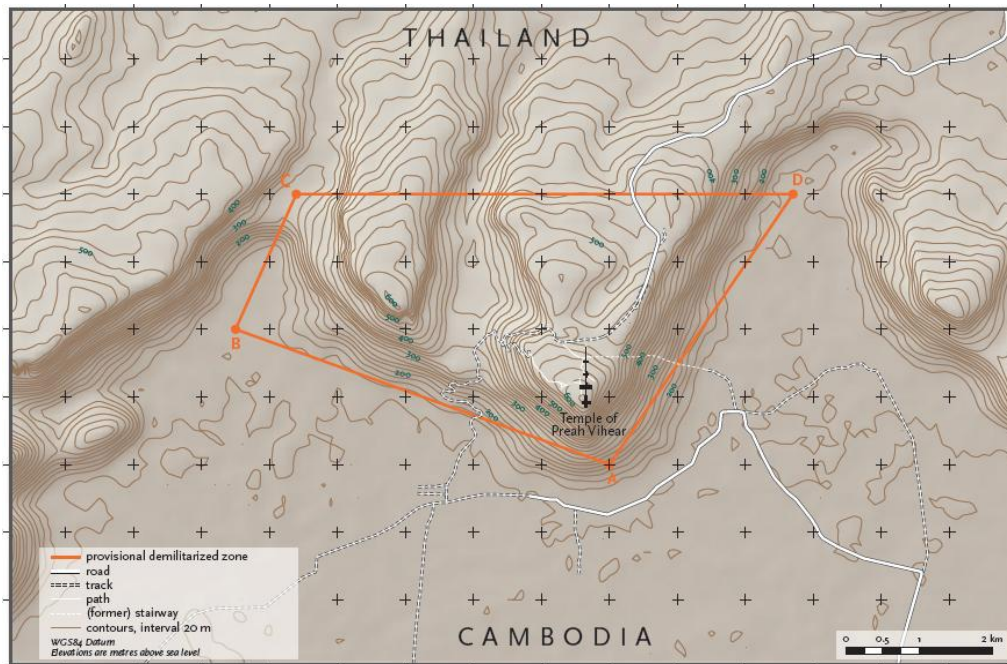


Figure 2: Map of the Demilitarized Zone imposed by the International Court of Justice in 2011.<sup>26</sup> The marked area corresponds roughly to the zone in dispute between Thailand and Cambodia. Courtesy of the International Court of Justice.

<sup>25</sup> Ibid.

<sup>26</sup> International Court of Justice, *Order: Request for the Indication of Provisional Measures*, ICJ, the Hague, (18 July 2011), pg 17, accessed online 06/02/2013. <http://www.icj-cij.org/docket/files/151/16564.pdf>.

## **Preah Vihear and the Franco-Siamese Border Treaties**

The Temple of Preah Vihear sits atop a high escarpment of the Dangrek Range dramatically overlooking the Cambodian plain below. The history of the site is generally traced to the 9<sup>th</sup> century by the efforts of the prince Indrâyudha to build a temple to Shiva during the reign of the Khmer King Jayavarman II. Over the course of the next three centuries Khmer rulers progressively added to the site until its final form was completed at the end of the 11<sup>th</sup> century.<sup>27</sup> During the 12<sup>th</sup> century the Khmer Empire receded as the Thai Empire came to prominence in South-East Asia. The long process of Thai-Cambodian interaction intensified during this period as the Thai empire gradually came to encompass most of the Khmer empire. Thai rulers were greatly influenced by ancient Khmer culture and styled themselves as the heirs to classical Khmer civilization as the provinces containing Preah Vihear and Angkor Wat fell under their control. As Buddhism rose in the region in the succeeding, the importance of Preah Vihear diminished and the site was gradually abandoned.

By the 19<sup>th</sup> century, Thailand, known in the West as Siam, was the dominant power in South-East Asia and had suzerainty rights over the Kingdom of Cambodia. Siam governed large areas of modern Cambodia, including Angkor-Wat, and the Siamese court integrated many customs of the Khmer rulers.<sup>28</sup> This position was threatened by the arrival of European colonial powers, the British in Burma and the French in Vietnam. In the 1860s France greatly increased its presence in Cambodia, ultimately declaring a protectorate and ending Siam's suzerainty over Cambodia.

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<sup>27</sup>ICOMOS, "Preah Vihear."

<sup>28</sup> Charnvit Kasetsiri, "Thailand-Cambodia: A Love-Hate Relationship," in *Kyoto Review of Southeast Asia*, 3 (March 2003), accessed 10/30/2012, <http://kyotoreview.cseas.kyoto-u.ac.jp/issue/issue2/>.

Coinciding with the colonial shift of power in the late 19<sup>th</sup> century was the “rediscovery” of Ancient Khmer culture by French archeologists, anthropologists, and historians. French explorer Henri Mouhot captured the Western world’s wonder with his “discovery” of Angkor Wat in 1860.<sup>29</sup> Quickly the politics of heritage came to the fore as both the French and Thais sought to use links to the Khmer Empire to justify their legitimacy to rule over disputed zones. The French portrayed themselves as the protectors of Khmer ethnicity against Thai domination while Siam’s kings claimed the mantle as the direct heirs to the Khmer Empire’s legacy and political legitimacy. This contested legitimacy was particularly centered on modern day Cambodia’s Northern and Western provinces which contained large Khmer populations. They were in the center of the Khmer Empire but had been administered as client provinces of Siam for centuries.

The Franco-Siamese war of 1893 saw a dramatic shift in the balance of power in South East Asia. In addition to losing all of the Kingdom of Laos to French-Indochina, the Siam saw France successfully extended their Cambodian protectorate to the left bank of the Mekong River. The conflict led to a full realization of the weakness of Siam’s position, leading to both a series of reforms that would eventually transform Siam into the modern Thai state and an immediate desire on the part of Siamese leaders to avoid direct confrontations with France that would provide pretexts for further French expansion.

It was under this long shadow that the Franco-Siamese treaties of 1904 and 1907, establishing the current borders between Thailand and Cambodia, were negotiated. The French aim was to acquire as much territory of the “historical” Khmer zone as possible while establishing a permanent “natural” border based on physical features such as mountain

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<sup>29</sup> Heneri Mouhot, *Voyage dans les royaumes de Siam, de Cambodge, de Laos*, (1868), [http://books.google.fr/books?id=BaI2AAAAMAAJ&printsec=frontcover&hl=fr&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.fr/books?id=BaI2AAAAMAAJ&printsec=frontcover&hl=fr&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false)



ranges. Siam simply sought to retain as much territory as possible, while drawing a distinction between highland Khmers of Thai nationality and the Cambodian Khmers of the French protectorate.<sup>30</sup>

In the treaty of 1904, through which Cambodia gained its current northern frontier, the border was established from the left bank of the Tonle Sap Lake North along the parallel until it joined the river Prek Kompong Tiam. It then followed a line of latitude until it connected to the Pnom Dang Mountain chain. From there the border followed:

*“...the watershed between the basins of the Nam Sen and the Mekong... and the Nam Moun... and joins the Pnom Padang chain, the crest of which it follows eastwards as far as the Mekong. Upstream from that point, the Mekong remains the frontier of Siam.”*<sup>31</sup>

The Dangrek Range forms a great part of the “watershed” zone and the Temple of Preah Vihear sits right on its crest. Unsurprisingly, the lines prescribed by the treaty were in zones that had never been mapped, and that are to this day difficult to access. The 1904 treaty therefore established a Franco-Siamese mixed commission to map and demarcate the new border. While the commission contained representatives from both Siam and France, the on-the-ground surveying work was done largely by French army officers who submitted their work for the commission’s approval. The reason was technical, Siam simply lacked the technical capacity to do mapping on its own. Indeed, at the same time the Mixed Commission

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<sup>30</sup> Sir Percy Spencer, “Dissenting Opinion of Sir Percy Spencer,” in *Judgment of 15 June 1962*, ICJ, the Hague (1962), pg. 101-144. Accessed 02/06/2013. <http://www.icj-cij.org/docket/files/45/4885.pdf>. Spencer provides an inclusive summary of the Franco-Siamese border treaty negotiations and geo-strategic position while arguing his dissenting position.

<sup>31</sup> Percy, pg. 120. In his dissent Percy cites the above passage from Article 1 of the *Protocol of the Treaty of March 1907* that defines the border in the temple area. In Percy’s analysis of the meetings and correspondence associated with the mixed commission, there was no question that the treaty articles defined the border and that work of the mixed mapping commission wouldn’t trump the treaty provisions.

was conducting its work, French cartographers were being commissioned by Siam to create the first modern maps of Thailand itself.

The major work of the mixed commission focused on the difficult task of marking the arbitrary parallel and meridian lines through the Cambodian forests. The rivers, and critically watersheds, were not closely surveyed or marked, precisely because these natural features were chosen to be visibly obvious and self-marking. The French were unsatisfied by the difficulties and imprecision of the borders in the parallel and meridian zones and ultimately negotiated the Treaty of March 23rd 1907, which expanded Cambodia to the west and established a border completely based on river and watershed lines. The Mixed Commission dissolved itself and French cartographers provided copies of their maps to the French and Siamese. It would not be until widespread use of aerial photography in the 1930s and World War Two, that it would be realized that the topography of large areas of the mountainous border zone, including Preah Vihear, had been inaccurately mapped.<sup>32</sup>

Following the signing of the Franco-Siamese Treaties of 1904 and 1907, the border remained largely unmarked, and uncontroversial, for the next 30 years. The Temple of Preah Vihear was only accessible with difficulty and was accordingly not a major tourism destination. However, following the 1932 coup in Siam, which created modern Thailand's constitutional monarchy, Thailand's leaders increasingly sought ways to reverse the territorial losses to Britain and France. The Fall of France in 1940 gave the Thai government under Prime Minister Phibun the opportunity to reverse some of the losses of 1893 and 1904 during the Franco-Thai war of 1940-41. Thailand became an ally of Japan and fought against the Allies to regain lost Burmese territories lost to Britain in 1909. However, following the

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<sup>32</sup> Ibid, 122-124.

defeat of Japan, Thailand was obliged to restore the territory it had taken from the French and British Empires during the War.

The end of the war saw both France and Thailand pressing to re-establish their sovereignty, and quickly the status of Preah Vihear became a diplomatic issue. Thai military and police forces started to occupy the site in 1949, which quickly generated French objections and a Thai withdrawal.<sup>33</sup> At the core of the issue were the mapping errors of the Mixed Commission maps of the border region. France and Cambodia maintained that Thailand had accepted the submission of those maps as showing Preah Vihear as within the Kingdom of Cambodia. In 40 years, no complaint had been made and therefore Thailand had de-facto accepted the mixed commission map line as the frontier. Thailand maintained that the mixed commission maps were just rather informative aids and that the border followed the watershed line of the mountain as stipulated in the 1904 Treaty text. The temple is clearly on the Thai side of the watershed and the 1907 map was inaccurate, and therefore not binding in the Thai view.

Following the independence of Cambodia in 1953, Thailand re-occupied the temple, and Cambodia took up the defense of the Temple as a way to underline its newly acquired sovereignty. In 1959, Cambodia brought the case to the International Court of Justice for a judgment, seeking to have Cambodia's sovereignty over the temple and its surroundings upheld, along with the withdrawal of Thai troops.<sup>34</sup> The case attracted high profile attention in its day, with the former Attorney-General of England, Sir Frank Soskice arguing for Thailand and the former United States Secretary of State, Dean Acheson arguing for the

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<sup>33</sup> Ibid, 137-142.

<sup>34</sup> International Court of Justice, "Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) , Merits, Judgment of 15 June 1962," in *ICJ Reports 1962*, ICJ, the Hague (1962) pg. 6-36. Accessed 02/05/2013, <http://www.icj-cij.org/docket/files/45/4871.pdf> .

Kingdom of Cambodia. On the 15<sup>th</sup> of June 1962, the ICJ rendered its 9-3 decision that the Temple of Preah Vihear belonged to the Kingdom of Cambodia.

The ICJ ruled that Thailand had de-facto accepted the mapped line as the border when it had received the mixed commission's maps and had not objected to them until 1949. In the court's view, the treaty text of Article 1 had served merely as a guiding principle for border demarcation, but the map line was established as the border line by the French publication of the mixed commission's maps. Thailand's 40 year period of non-objection to the mapped border, along with a Thai royal visit to the temple with the French flag flying overhead in 1930, was interpreted by the court as implied acceptance of the mapped line showing Preah Vihear in Cambodia. Yet the ICJ limited its logic only to the determination of the sovereignty of Preah Vihear itself. It did not rule on Cambodia's request to have the map line declared the border line for the whole of the Dangrek region.<sup>35</sup> This left the issue of whether the border followed the mapped line or the treaty proscribed watershed line ambiguous. Bolstered by stinging dissenting opinions from the court's minority justices, the Thai government vigorously objected to the ICJ decision:

*"His Majesty's Government desires to make an express reservation regarding whatever rights Thailand has, or may have in the future, to recover the Temple of Phra Viharn by having recourse to any existing or subsequently applicable legal process, and to register a protest against the decision of the International Court of Justice awarding the Temple of Pra Viharn to Cambodia."*<sup>36</sup>

In addition to preserving its rights to future appeal, Thailand reiterated its position that the border follows the watershed in the Dangrek zone, not the 1907 mapped line, and laid

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<sup>35</sup> Ibid, pg. 36.

<sup>36</sup> Percy, Monticha Pakdeekong, "Who owns the Preah Vihear Temple? A Thai Position," *Journal of East Asia & International Law*, 2:1(2009), 229-237. Accessed via EBSCOhost December 7, 2011. The author cites Thai communication to the UN acting Secretary General in 1962. 233

claim to the 4.5 square kilometers of the plateau immediately surrounding the Temple of Preah Vihear. While most of the attention in the case was focused on the temple and its surroundings, Preah Vihear is a location of interest on an otherwise undeveloped border line, the issue of the discrepancy between the 1907 maps and the real watershed extended beyond the immediate temple area.

### **The Road to Creating the Temple of Preah Vihear World Heritage Site**

The international legal battles surrounding Preah Vihear were rapidly eclipsed by the horrendous human tragedy that engulfed Cambodia in the 1970s and 80s. The rise of the Khmer Rouge regime in 1972, followed by the tragedy of the killing fields, the intervention of Vietnam in 1979, and civil war throughout the 1980s, fundamentally ended Cambodia's ability to normally police its borders. The Preah Vihear, thanks to its remoteness, became an important Khmer Rouge stronghold. It was also the location of intermittent conflict between Cambodian refugees seeking to flee the civil war, and Thai forces seeking to keep the border closed. As was the case all along the border during this period, a vigorous black market grew as Thai merchants took full advantage of their unique position as the only possible suppliers for Cambodian refugees and rebel groups. This exploitative relationship had a profound impact on how Thai and Cambodian nationals view each other and goes a long way to explain the current mistrust between the two countries.<sup>37</sup>

When Cambodia finally emerged from the decades of strife in 1992, re-asserting Cambodian independence through recognition of Khmer culture became a major priority.

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<sup>37</sup> Lindsay French, "Politics to Economics at the Thai-Cambodian Border: Plus Ça Change..." *International Journal of Politics, Culture, and Society*, 15:3 (2002), 427-470. Accessed via JSTOR July 25 2012. French's border research showed that many of the players in Thai-Cambodian economic projects of the 1990s and 2000s got their start during the black market days, and the wartime experiences formed many of the current day attitudes and identities in the Thai-Cambodian relationship.

UNESCO and the World Heritage Convention played a critical role in helping Cambodia move past the Khmer Rouge period. In 1991, Cambodia signed the World Heritage Convention, and a year later the national symbol of Cambodia, Angkor Wat, was inscribed on the World Heritage list. The inscription not only served as a token of support for the new Cambodian government by the international community and as a source of national pride and sense of unity, but World Heritage tourism to Angkor Wat became a major driver of Cambodia's economy. In 2011, 2.5 million tourists visited the site, up from 60,000 in 1998. Cambodian officials plan that visitation will increase to 6 million by 2020.<sup>38</sup>

Cambodia's nomination of Preah Vihear was a logical continuation of Cambodia's national heritage policy. Economically, Preah Vihear would give Cambodia a Khmer "Machu Picchu" site to complement Angkor, representing a major tourism asset. As the location where the last Khmer Rouge forces surrendered to Cambodian authorities, Preah Vihear listing would be a powerful symbol of Cambodia moving beyond its troubled past.<sup>39</sup> Finally, listing the site as a Cambodian World Heritage Site was viewed by Cambodian leaders as a way to definitively demonstrate Cambodian sovereignty over the site.<sup>40</sup> Preparations for listing began in earnest following the final surrender of Khmer Rouge guerrillas at the site in 1998.

Despite the historical dispute, the new millennium opened with a growing consensus between Thailand and Cambodia for a peaceful resolution of the border dispute and joint

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<sup>38</sup> Associated Press, "Angkor Wat Plagued by Mass Tourism, Insufficient Management," *Heritage on the Wire*, (July 19, 2011). Accessed 02/06/2013. [http://globalheritagefund.org/onthewire/blog/angkor\\_wat](http://globalheritagefund.org/onthewire/blog/angkor_wat)

<sup>39</sup> Seth Mydans, "Last Rebels in Cambodia Send Message of Surrender," *New York Times*, December 6, 1998, accessed online December 7, 2011, <http://www.nytimes.com/1998/12/06/world/last-rebels-in-cambodia-send-message-of-surrender.html?scp=6&sq=%20Dec.%206,%201998,%20%20temple&st=cse>.

<sup>40</sup> Helaine Silverman, "Border Wars: the Ongoing Temple Dispute Between Thailand and Cambodia and UNESCO's World Heritage List," *International Journal of Heritage Studies*, 17:1(2011), 1-21, accessed online December 7, 2011, <http://www.tandfonline.com/doi/full/10.1080/13527258.2011.524001>.

development of the temple as an international tourism destination.<sup>41</sup> Thailand's support for Cambodia's listing of Preah Vihear was a major part of Prime Minister Thaksin Shinawatra's program of expanding economic partnerships with all of Thailand's neighbors. By 2007, Cambodia and Thailand had seemingly reached a common position of support expressed in a World Heritage Committee decision regarding the site:

*“The State Party of Cambodia and the State Party of Thailand are in full agreement that the Sacred Site of the Temple of Preah Vihear has Outstanding Universal Value and must be inscribed on the World Heritage List as soon as possible. Accordingly, Cambodia and Thailand agree that Cambodia will propose the site for formal inscription on the World Heritage List at the 32nd session of the World Heritage Committee in 2008 with the active support of Thailand.”*<sup>42</sup>

The nomination of Preah Vihear was scheduled for reconsideration by the July 8<sup>th</sup> meeting of the World Heritage Committee in 2008 in Quebec. On March 5<sup>th</sup>, Thailand's newly elected Prime Minister Samak Sundaravej reiterated Thailand's support of Cambodia's nomination. The ICOMOS site evaluation, prepared on June 25<sup>th</sup>, contained a joint statement of support from both countries, and a pledge to develop a joint management plan for the temple site and for the buffer zones for the disputed area around the temple.<sup>43</sup> Both Thailand and Cambodia were members of the World Heritage Committee, and given the statements of support by both sides, the nomination seemed wholly uncontroversial.

However days before the Quebec meeting, internal political developments upended Thailand's position on inscription. Shinawatra's ouster by a military coup in 2006

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<sup>41</sup> Geographically, this is a necessity as the temple is only accessible from the Thai side.

<sup>42</sup> World Heritage Committee, “Decision 31COM8B.24-Nomination of Natural, Mixed and Cultural Properties to the World Heritage List- the Temple of Preah Vihear,” *31<sup>st</sup> Session of the World Heritage Committee*, Paris: World Heritage Centre (2007), accessed online December 7, 2011, <http://whc.unesco.org/en/decisions/1322>.

<sup>43</sup> Tim Williams, “The Curious Tale of Preah Vihear: The Process and Value of World Heritage Nomination,” *Conservation and Management of Archaeological Sites*, 13:1 (2011), 1-7.

fundamentally destabilized Thai politics, and had a profound impact on Thai foreign policy.<sup>44</sup> Facing growing protests the military, after establishing a new constitution, held elections in 2008 and Sundaravej was elected on a platform to restore Shinawatra's reputation and foreign policy. This election result mobilized Shinawatra's military, conservative, and nationalist opponents. They used the Sundaravej government's statements of support for Preah Vihear listing as a wedge issue in Thai domestic politics. Opposition groups accused Sundaravej of *khai chat*, or selling out the motherland, as they claimed that inscription would mean the cession to Cambodia of the disputed 4.5 square kilometers surrounding the temple.<sup>45</sup>

The issue was raised before the anti-Shinawatra Constitutional Court who ruled on June 29<sup>th</sup>, 10 days before the Quebec meeting, that the government had violated the constitution by supporting the nomination and ordered the government to withdraw its support.<sup>46</sup> The ruling was widely viewed in the international heritage community as an attempt of ardent Thai nationalists to undermine legitimate Cambodian efforts to preserve the temple.<sup>47</sup> Sundaravej was forced to resign in September for violation of the constitution, on conflict of interest charges, and for having been negligent in his duty by issuing formal support for Cambodia's nomination.<sup>48</sup>

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<sup>44</sup> Pavin Chachavalpongpun, "Diplomacy Under Siege: Thailand's Political Crisis and the Impact on Foreign Policy," *Contemporary Southeast Asia: A Journal of International & Strategic Affairs*, 31:3 (2009), 447-467, Accessed via EBSCOhost December 7, 2011.

<sup>45</sup> *Ibid*, 456.

<sup>46</sup> Associated Press, "Plans to Safeguard Temple are Blocked in Court," *The Guardian*, June 29, 2008, accessed online December 7, 2011, <http://www.guardian.co.uk/world/2008/jun/29/1>.

<sup>47</sup> Tom Fawthrop, "Two Nations, One God," *ibid*, July 15, 2008, accessed online December 7, 2011, <http://www.guardian.co.uk/commentisfree/2008/jul/15/cambodia.thailand>.

<sup>48</sup> Chachavalpongpun, "Diplomacy Under Siege" *ibid*, 457.



The change of Thai position caused an immediate uproar amongst supporters of Cambodia's inscription efforts. They were quick to cite Article 11 of the World Heritage Convention:

*"The inclusion of a property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State shall in no way prejudice the rights of the parties to the dispute."*<sup>49</sup>

Yet in Thailand's view, the World Heritage Convention's insistence on management standards allowed for an effective loss of sovereignty. Article 4 of the World Heritage Convention clearly calls on States Parties to use their sovereign powers to protect inscribed sites:

*"Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage, ..., situated on its territory, belongs primarily to that State."*<sup>50</sup>

The Operational Guidelines recommendations regarding the protection and management of World Heritage sites call for sovereign authority to be exercised in protecting a site, before it is considered suitable for inscription.

*"97. All properties inscribed on the World Heritage List must have adequate ... protection and management .... This protection should include adequately delineated boundaries..."*

#### Buffer Zones

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<sup>49</sup> UNESCO, *World Heritage Convention*, Article 11, paragraph 3.

<sup>50</sup> *Ibid*, pg. 3

*104. ..., a buffer zone ... should include the immediate setting of the nominated property, important views and other areas or attributes that are functionally important as a support to the property and its protection.*”<sup>51</sup>

From the Thai perspective, of the *Operational Guidelines* required and legitimized the use of Cambodia’s sovereign authority over not only the temple proper but also over the 4.5 square kilometer zone around the Preah Vihear to protect its outstanding universal value. Even when Thailand had supported the nomination, it was on the basis that site boundaries and management be developed jointly. With the withdrawal of Thailand’s cooperation following the Constitutional Court’s decision, this joint cooperation was impossible. Beyond the legal question, there was the issue of perception. For the global public, once Preah Vihear was inscribed as a Cambodian site, it would be seen as Cambodian forever. Given the widespread Thai feeling of having been wronged by the international community in the 1962 ICJ ruling, UNESCO’s “giving” of the site to Cambodia provided Thai opposition parties a powerful issue to rally around.

It was in this charged context, that ICOMOS gave its evaluation of Preah Vihear suitability for inscription according to the *Operational Guidelines*. While ICOMOS recognized that the site possessed OUV, it had several reservations regarding the preservation of the site. ICOMOS judged that the core site area did not fully protect the site’s OUV:

*“In the original nomination [from 2007] the promontory on which the temple is located was included in the core area. Now the core area has been revised and is smaller, including only the main monument. ICOMOS considers that the values of Preah Vihear are not limited to the monument in isolation: it extends to a wider frame...”*<sup>52</sup>

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<sup>51</sup> World Heritage Center, *Operational Guidelines*, 25-27. Emphasis added.

<sup>52</sup> Williams, “The Curious Tale,” 3. Williams cites decision WHC-08/32.com/inf.8b1.add.2. I used his English translations of the French text in the decision.

This wider frame included the whole of the disputed plateau, and that in addition wider buffer zones were needed. ICOMOS's opinion effectively mandated that all of the disputed area must be included in the management plan for the site to meet the *Operational Guideline's* criteria. As this was politically impossible, ICOMOS's recommendation:

*"[...] ICOMOS considers that this [nomination] would, in the absence of an appropriate map and demarcation of certain areas, limit the recognition of all the cultural values of the property. On this basis, ICOMOS does not wish to recommend it officially to the committee."<sup>53</sup>*

The ICOMOS recommendation gave the World Heritage Committee a chance to repeat its decision from the year before, where it acknowledged on principle the site's value, but declined to inscribe.<sup>54</sup> However, the World Heritage Committee was in no mood to wait. There was a wide perception that Cambodia, who had been in the process of nominating the site since 2003, had waited long enough. The decision to delay inscription in 2007 was based on the Thai government's promise of support. The current Thai position was viewed as an overtly political attempt to deny Cambodia the inscription of a clearly meritorious site.<sup>55</sup> The World Heritage Committee decided to overrule the recommendation of ICOMOS and inscribe the site.

However, ICOMOS's interpretation of the Operational Guidelines requirements was included in the final inscription decision:

*"...15. Requests the State Party of Cambodia to submit to the World Heritage Centre, by 1 February 2009, the following documents:*

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Fawthrop, "Two Nations, One God."

- a) a provisional map providing additional details of the inscribed property and a map delineating the buffer zone identified in the RGPP;*
- b) updated Nomination dossier to reflect the changes made to the perimeter of the property*
- c) confirmation that the management zone for the property will include the inscribed property and buffer zone identified in the RGPP;*
- d) progress report on the preparation of the Management Plan;*

*16. Further requests the State Party of Cambodia to submit to the World Heritage Centre by February 2010, for submission to the World Heritage Committee at its 34th session in 2010 a full Management Plan for the inscribed property, including a finalized map.*<sup>56</sup>

The inclusion of these requests by the committee ensured that the border dispute issue would continue to be an active political question at subsequent World Heritage Committee meetings, as the World Heritage Center and Advisory Bodies were now obligated to assess the progress in Cambodia's implementation of the committee's requests for a comprehensive management plan with delineated site boundaries.

### **In the Streets: Aftermath of the Inscription and Current Crisis**

The listing of the Temple of Preah Vihear on the World Heritage List further radicalized Thai internal politics. The People's Alliance for Democracy, or "Yellow Shirts," used the issue to intensify its opposition to the government. It was the event that turned their political movement into a mass social protest by attracting previously apolitical white-collar workers who accused the government of failing to protect the nation's sovereign rights.<sup>57</sup> The movement peaked in November of 2008 when Yellow Shirt protesters blocked Bangkok's two

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<sup>56</sup> World Heritage Committee, "Decision 32COM 8B.102 Examination of Nominations Sacred Site of the Temple of Preah Vihear," *32<sup>nd</sup> Session of the World Heritage Committee*, Quebec: World Heritage Centre (2008), accessed online December 7, 2011, <http://whc.unesco.org/en/decisions/1548>.

<sup>57</sup> Chachavalpongpun, "Diplomacy Under Siege," 461.

airports, bringing Thailand's economy to a halt until the Constitutional Court dissolved the governing party following corruption charges.

The instability had a direct impact on Preah Vihear. In October 2008, Thai and Cambodian troops exchanged fire, leading to deaths on both sides. The resulting nationalist rhetoric in both countries led to an escalating situation.<sup>58</sup> Clashes continued into 2009. In March, a hundred Thai troops took position in the disputed zone and Cambodia threatened to use force to expel the Thais. The Yellow Shirt movement increasingly used the temple as its central rallying point, staging mass rallies near the disputed zone. In response, Cambodian forces stated it would use force against individuals illegally crossing the border.

The pressure of Yellow Shirt protests, combined with the dissolution of the previous governing party, led to the ascension of Prime Minister Abhisit Vejjajiva's conservative government in December 2008. He immediately used Thailand's position as a member of the World Heritage Committee to request a review of Preah Vihear's status with a view to delisting at the committee's meeting in 2009 in an attempt to bolster his domestic support. Co-committee member Cambodia vigorously opposed the move, and bi-lateral relations worsened. The decision of the committee did little to resolve the conflict by requesting that Cambodia report on the progress of implementing its site management plan.<sup>59</sup>

For the Yellow Shirts, this was a double affront. Not only did the Thai government fail in the effort to de-list the temple, the World Heritage Committee was seen as taking Cambodia's side in the territorial dispute. At the same time, Vejjajiva's government was

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<sup>58</sup> Ibid.

<sup>59</sup> World Heritage Committee, "Decision 33COM 7B.65 Temple of Preah Vihear," *33rd Session of the World Heritage Committee*, Seville: World Heritage Centre (2009), accessed online December 7, <http://whc.unesco.org/en/decisions/1857>.

"4. *Requests the State Party to submit to the World Heritage Centre, by 1 February 2010, a report on the progress made in the implementation of the recommendations by the Committee in its Decision 32 COM 8B.102, for the examination by the World Heritage Committee at its 34th session in 2010.*"

facing increasing pressure from the pro- Shinawatra “Red Shirt” movement. The Red Shirts pointed to Preah Vihear as the prime example of pro-military Yellow Shirts using nationalism to further its electoral goals, hurting Thailand’s standing in the world. Ongoing Red Shirt protests greatly delegitimized the Thai government both domestically and internationally.<sup>60</sup>

2010 started in a relative calm for the temple, as Vejjajiva’s government attempted to walk a tightrope between the Yellow and Red shirt movements. Thailand’s position on Preah Vihear remained the same as a year before, but Thailand put an emphasis on not inflaming the issue. Cambodia pushed for more international mediation to resolve the issue. The 2010 decision of the World Heritage Committee also reflected this calm, by acknowledging the receipt of “the documents submitted by the State Party” to the World Heritage Center, congratulating Cambodia’s efforts at coordinating international cooperation for the site’s preservation, and deciding to consider “the documents submitted” at committee’s next meeting in 2011.<sup>61</sup> Yet this calm didn’t hold. Following the violent dispersal of Red Shirt protesters in April and May 2010, Vejjajiva’s government suddenly found its right flank threatened by Yellow Shirt opposition in December, primarily for failing to remove Preah Vihear from the World Heritage List.<sup>62</sup> Elections were scheduled for July 3<sup>rd</sup> 2011, and the Thai government started to take a hard line on Preah Vihear to rally support.

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<sup>60</sup> Chachavalpongpun, “Diplomacy Under Siege,” 462.

<sup>61</sup> World Heritage Committee, “Decision 34COM 7B.66 Temple of Preah Vihear,” *34th Session of the World Heritage Committee*, Brasilia: World Heritage Centre (2010), accessed online December 7, <http://whc.unesco.org/en/decisions/4174>. The wording of “the documents submitted” indicates subtle posturing by the committee. The documents were information clarifying the requested management plan from 32 COM 8B.102, however, Thailand objected to the open discussion of a management plan, and “documents submitted” was the compromise language.

<sup>62</sup> BBC, “Profile: Thailand’s Reds and Yellows,” *BBC News*, July 1, 2011, accessed December 7, 2011, <http://www.bbc.co.uk/news/world-asia-pacific-13294268>.

On December 29, seven members of the Yellow Shirt movement were arrested by Cambodian forces for illegally crossing to the temple, and two were eventually sentenced to jail terms for espionage. On the news, Yellow Shirt protesters took to the streets demanding that Thailand withdraw from the World Heritage Convention and expel Cambodian forces from the disputed area. The situation escalated as both Thailand and Cambodia mobilized heavy military forces in the area. Sporadic clashes and shelling broke out in February and lasted until April, resulting in deaths on both sides, damage to the temple, and the displacement of up to 50,000 local villagers. In addition clashes sprang up along other Khmer temples along the Thai-Cambodian frontier. In April, ASEAN and the UN Security Council were able to mediate a tenuous cease-fire.<sup>63</sup> On April 28, Cambodia filed a proceeding with the ICJ to clarify the status of the disputed zone.<sup>64</sup>

The 35<sup>th</sup> session of the World Heritage Committee opened on June 19, 2011 amidst high tension between co-committee members Thailand and Cambodia. As closed door consultations between the World Heritage center and the States Parties progressed on a consensus text proceeded, talks began to falter on familiar fault lines. Thailand objected to the decision making any reference to a management plan or external mediation, preferring to solve the dispute through bilateral means. Cambodia sought to involve outside mediation and a reaffirmation of its rights over the temple. There was also a dispute over whether to call for “restoration” and “repair” of the temple, sought by Cambodia as a way of placing blame on Thailand for damages caused by military action, or “protection” and “conservation,” as sought by Thailand. Unfortunately, time pressure forced the World Heritage Committee to

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<sup>63</sup> Song Yinghui, “A No-Win Conflict: Cambodia-Thailand Border Dispute Harms both Countries as well as Regional Peace,” *Beijing Review*, March 24, 2011, Accessed 10/30/2012, [http://www.bjreview.com.cn/print/txt/2011-03/20/content\\_344884\\_2.htm](http://www.bjreview.com.cn/print/txt/2011-03/20/content_344884_2.htm).

<sup>64</sup> International Court of Justice, *Press Release: Cambodia files an Application requesting interpretation of the Judgment rendered by the Court on 15 June 1962*, The Hague: International Court of Justice May 2, 2011. Accessed online December 7, 2011, <http://www.icj-cij.org/docket/files/151/16480.pdf>.

debate the decision before the consensus had been reached. Thailand requested that the committee table the motion without debate, and when the motion failed, Thailand theatrically renounced the World Heritage Convention and walked out of the World Heritage Committee meeting.<sup>65</sup>

On 3 July, Thailand's political pendulum swung back again as elections ushered in a large Red Shirt majority and Prime Minister Yingluck Shinawatra, Thaksin Shinawatra's sister, set a priority on improving Thailand's Cambodian relationship.<sup>66</sup> On 18 July, the ICJ issued a preliminary ruling establishing a provisional Demilitarized Zone in the disputed area and ordering a withdrawal of military forces from the area. Despite the rulings, it took a year for both countries to withdraw their forces. Currently all players are waiting for the ICJ process to evolve, with both Thai and Cambodian leaders pledging to use all legal tools to defend their interests. Meanwhile at UNESCO, the issue remained quiet and did not appear on the Agenda of the 36<sup>th</sup> Session of the World Heritage Committee in Moscow.

However, despite the current calm, the issue is far from resolved. When the ICJ makes its ruling on the Cambodian request for interpretation of the 1962 decision, it will likely have profound political implications. A ruling against Thailand could likely re-ignite Yellow Shirt protests, while a ruling against Cambodia would cause a large scale reaction and further reinforce the difficult status-quo. Then there is the larger border question. The fundamental question of the 1962 case was if the Thai-Cambodian border was marked by the natural features described in the text of the 1904-1907 treaties, or the line indicated on the Mixed Commission maps. The question was side-stepped in 1962, but the wider border zone

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<sup>65</sup> Williams, "The Curious Tale," 3.

<sup>66</sup> Jason Szep, "Thaksin Party Wins Thai Election in a Landslide," *Reuters Online*, July 3, 2011, accessed on December 12, 2011, <http://www.reuters.com/article/2011/07/03/us-thailand-election-idUSTRE76013T20110703>.



contains other ancient Khmer temples that could be the subject of dispute. Indeed, the 2011 Cambodian request to the ICJ specifically states that violence and disturbances had extended to other border temples as well, raising the specter of generalized border violence.<sup>67</sup>

If tragedy has been appropriately defined as a situation where all actors are behaving according to their sense of what is morally right which leads them to a situation of intractable conflict, then the Preah Vihear dispute is ‘tragic’. Both Thailand and Cambodia are attempting to reassert their people’s sovereign authority against the backdrop of historical colonial violation of that independence. ICJ justices and World Heritage Actors are trying to apply the principles of international law and practice that they are mandated to uphold. All players are acting as they feel they should, and yet the conflict only deepened over time. The blame for the situation can’t readily be attributed entirely to one World Heritage actor, so the question must be what caused the systemic fault that made it impossible to develop an alternative to the adversarial confrontational dynamic between Thailand and Cambodia in the case of Preah Vihear? This is the issue addressed in chapter three.

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<sup>67</sup> International Court of Justice, “Order,” (2011), 11-14. The court noted reports of violence and civil unrest in areas ranging up to 150 kilometers from Preah Vihear.

### **Chapter III: Legal Logics and Political Disputes, the Need for Flexibility**

The case of Preah Vihear should be alarming for proponents of cosmopolitan institutionalism. Two peaceful neighbors--both signatories to the World Heritage Convention with stated commitment to its preservation values, both agreeing that Preah Vihear possesses outstanding universal value worthy of inclusion on the World Heritage List, both members of the World Heritage Committee at the time of inscription--find themselves in an intractable border dispute that the international community has been unable to effectively mediate. This chapter analyzes this failure as an example of a legalistic and technical international institution being unable to effectively address an essentially political dispute.

#### **Legal/Technical Framework and a Political Dispute**

During the 1930s, English international relation's theorist E.H. Carr was grappling with the similar, though altogether more serious, breakdown of the League of Nations system.<sup>68</sup> Throughout the 1920s, attempts were made to set up dispute resolution bodies that would resolve disputes above the vulgar plane of politics using the principles of universal international law. Yet, by the mid 1930s it was clear that the system not peacefully resolving disputes as designed, and many bemoaned the "politicization" of these institutions or their incomplete legal structure. Many felt that the solution lay in creating an even more robust system of international law and tribunals which could issue binding decisions.

Carr's analysis instead focused on the inherent political nature of the international system and any resultant legal or regulatory framework.<sup>69</sup> Far from being above politics, or

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<sup>68</sup> Carr.

<sup>69</sup> Ibid, pg. 10- 12

capable of supplanting political modes of decision-making, all legal frameworks are the result of a political process and consensus. As long as a dispute remains legal, defined by Carr as a situation where both states accept the underlying political status quo and are merely pressing their rights within that framework, law provides an effective means of conflict resolution. However, if the dispute is political, where one of the parties is seeking to change the political *status quo*, then legal processes are incapable of solving the problem because that state views the political consensus surrounding the legal framework as illegitimate and refuses to be subject to it. In this case a state seeking to change a perceived “unjust” law or regulation, or how it is interpreted, won’t be deterred by an unfavorable ruling. Indeed this will probably induce the state to press its case against the status quo even harder.

The ability of international legal structures to resolve problems are especially limited, argued Carr, because of the extremely superficial nature of political consensus between the actors at the international level. The sovereignty and independence of states underpins the international system. There is no accepted international legislative authority that can draft law. States are only bound by the treaties and agreements that they sign, and they always reserve the right to interpret their rights and obligations under agreements themselves. Given all these realities, Carr argued that international law and legal logic could only successfully resolve the limited number of disputes “... either pecuniary claims or disputes about national frontiers in remote and sparsely inhabited regions” that were politically uncontroversial and therefore easy for both states to agree to resolve the dispute in a legal framework.<sup>70</sup> The vast majority of international disputes were inherently political since the conflicting parties had

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<sup>70</sup> Ibid, pg. 180.

no consensus on how to delegate the dispute to a third party and had to be solved with political means.

Furthermore, in international relations, the law tends to become a tool in the larger political power struggles on the international level. Carr argued that universalist international law always faces a potential legitimacy problem in its formulation and application because it doesn't reflect the universal consensus of the international community, but the consensus of the dominant power bloc that brought the framework for international relations into being. The law then becomes a shield, used by dominant powers to maintain the status-quo. The evolution Carr observed through the 1920s and 30s was the following: the more the international political status quo was challenged, the more the status-quo powers insisted on the sanctity of international law and its strict application.

Yet this insistence on law did not resolve the conflicts of the interwar period because the debates were inherently political. The primary cause was the international legal system of the League of Nations. Political forces in non-*status quo* forces in Germany, Italy, Japan and elsewhere concluded that political reforms could not be achieved within the League of Nations system, leading to withdrawal and the seeking of political change through other means, and ultimately war. For Carr, the death of the post WWI attempt at international cosmopolitan governance was its inability to successfully allow for political changes to international law, and any future system of cosmopolitan governance would have to successfully address and resolve political disputes through non-violent political processes.

Using the lens of Carr's framework, the challenge of the Preah Vihear conflict becomes simpler to understand. The question of the status of Preah Vihear is inherently a political dispute. Both Thailand and Cambodia don't accept the legitimacy over the other's exercise of sovereignty over the temple. The lack of consensus makes it impossible for the

two sides to agree on how to implement World Heritage's quasi-legal *Operational Guideline* prescriptions for the establishment of management plans, and the management plan issue becomes the focus of the conflict.

Thailand's position is rooted in an objection to the political status-quo of its border based on the feeling of having been wronged by the international community at least three times: first, in creating the border that ceded large sections of Thai-controlled territory under the pressure of French imperialism, second, by the ICJ's "unjust" ruling of 1962, and finally, by the World Heritage Committee's "inappropriate" decision to list the site with instructions for Cambodia to develop management plans that included the disputed area.

Cambodia's position is based on the desire to end Thailand's historic abuse of Cambodian sovereignty. This dates from the pre-colonial client relationships to Thailand's arbitrary occupation of the temple in the 1950's following Cambodia's independence, and culminating in Thailand's exploitative behavior during Cambodia's civil wars. By asserting its position on Preah Vihear at the ICJ and World Heritage Committee, Cambodia is leveraging international norms to force a more equal-footed relationship with Thailand.

Compounding the specific political dispute between Thailand and Cambodia is the growing erosion of political consensus at UNESCO, amongst the States Parties, between them and the Advisory Bodies, and concerning the interpretation and future modifications to the *Operational Guidelines*. As with Carr's League of Nations, UNESCO was founded on a general consensus of the dominant World Powers at the end of World War Two. As states joined UNESCO, particularly from the developing world following decolonization, the current north-south struggle, which defines the UN system in general, developed between the western *status-quo* powers and activist states who attempted to use UNESCO as a forum to reform the perceived political and economic inequalities in the global system. Thanks to their

large numbers, UNESCO's one-country-one vote decision making process, and the agency's unusually large area of competence, UNESCO became a forum of choice for reform-minded states. The most dramatic example of this political dynamic were the New World Information and Communication Order debates of the 1980s, which saw the withdrawal of the United States and Great Britain from UNESCO.<sup>71</sup>

The World Heritage Convention has followed a similar evolution. The text and intent of the convention are heavily influenced by western states and preservationists who wanted to internationalize preservation standards that had just been finalized at home.<sup>72</sup> Indeed, the U.S. National Park Service describes the World Heritage Convention as “the American national park idea being carried out worldwide.”<sup>73</sup> This is why both OUV and exemplary preservation are co-equally important in the eyes of the Convention and Operational Guidelines. As one Western heritage professional put it in an interview in 2011, “insisting that appropriate protection measures are in place before inscription is the only leverage we have on them [states parties, especially developing states] to do the right thing.”<sup>74</sup>

As the World Heritage convention exploded in popularity, and membership, in the 1980s and 90s this initial political consensus was challenged. Developing states primarily became attracted to the convention for its potential to encourage heritage tourism. Heritage professionals from the developing world also stressed that their conservation context was completely different than in the global north and bemoaned the historically Western bias in the make-up and perspective of the Advisory Bodies. They argued for flexibility in World

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<sup>71</sup> Chloé Maurel, *Histoire de l'UNESCO les Trente Premières Années, 1945-1974*, Paris : L' Hartmann, (2010). Clare Wells, *The UN, UNESCO, and the Politics of Knowledge*, New York: St. Martin's Press, (1987).

<sup>72</sup> Peter Scott, “The World Heritage Convention and the National Park Service,” *The George Wright Forum*, 28:3, (2011), pg. 279-290. Accessed online 02/06/2013, <http://www.georgewright.org/283stott.pdf>.

<sup>73</sup> National Parks Service, *World Heritage Convention*, webpage, NPS: Washington D.C. Accessed 02/06/2013. <http://www.nps.gov/oia/topics/worldheritage/worldheritage.htm>

<sup>74</sup> Author's observations and interviews during the 35<sup>th</sup> Session of the World Heritage Convention, Paris 2011.

Heritage preservation guidelines that allowed sites to be listed first on the basis of their outstanding universal value and that robust protection would be developed over time. There is a wide spread feeling that developing states would love to have a U.S. style national parks system, but that it is unreasonable to expect a developing state to marshal the resources necessary to achieve that level of protection before being able to access the economic benefits of a World Heritage designation.

By the end of the 2000s these different interpretations about how to implement the convention had given rise to a structural political divide at the World Heritage Committee concerning the decisions to inscribe sites. A typical dispute would follow the following pattern. The Advisory Bodies deem that a proposed site has outstanding universal value, but that the management plans were lacking in some respect. Thus the site shouldn't be inscribed at this time. This advisory opinion becomes the recommended decision prepared for the World Heritage Committee by the World Heritage Center and is supported by committee member states who support the traditional view of the convention under the banner of "maintaining the integrity of the convention and Operational Guidelines." Developing states would object to this determination arguing along the lines described above, and would use their more than two thirds majority on the committee to change a "negative" decision to a "positive" one.<sup>75</sup> The traditionalist camp would then insist that the new decision be worded

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<sup>75</sup> Ibid. Currently there are 4 possible decisions the committee can take regarding a site: "Inscribe" which places the site on the list, "Refer" which sends the file back to the submitting country for further revisions and the site is placed on the agenda for the next year, "Defer" sends the file back to the submitting country for major revisions, including an onsite evaluation by advisory bodies, and "Does not Inscribe" more or less definitively excludes a site from inclusion, typically because it is evaluated to lack Outstanding Universal Value. The decision debates typically involve the developing states trying to "upgrade" a decision. Defer to Refer, Refer to Inscribe etc. However, the content of the Advisory Body's evaluation is usually included in the final decision. In 2011, this led to many "poisoned gift" refer/defer debates. The Advisory Body would determine that it needed to do additional onsite evaluations before being able to provide a recommendation, and would recommend deferral. The committee would "upgrade" the decision to referral. Because referrals do not allow for onsite visits, the Advisory Bodies will not be able to evaluate the site and will automatically recommend deferral at the next year's committee meeting, thus completing the procedural catch -22.

in a way that conforms to the operational guidelines and that includes the Advisory Body's original recommendations for improved site management.

The developing states hold a political majority in the World Heritage Committee and share a general view that the Advisory Bodies are opaque and biased in their evaluations of their sites, and thus they build coalitions to support the inscription of their sites. The traditionalist camp focuses on defending the evaluations of the advisory bodies and using the Operational Guidelines to constrain the actions of the developing states. This dynamic has led to an increasingly tense dynamic amongst the actors of the World Heritage system.

The decision to inscribe Preah Vihear at the 2008 Quebec World Heritage Committee meeting was therefore subject to these two fundamentally political challenges to the *status quo* of the international system and the World Heritage Convention. The site had been the subject of previous debates at the World Heritage Committee. In 2007, the Committee had accepted the ICOMOS tactful formulation that declared the site to have outstanding universal value but declined to inscribe the site on the basis of unresolved site management issues. A year later in the context of Thailand's abrupt withdrawal of support and a widespread feeling that Cambodia had been led along long enough, the proposed decision to re-declare the site's value while declining to inscribe it on management grounds was rejected. The committee inscribed the site, and as per typical practice, included the ICOMOS management evaluations as part of the decision, requesting that Cambodia report back to the committee on its progress in addressing the management plan concerns. This mandate created a re-occurring agenda item that placed the World Heritage Committee and UNESCO in the center of Thai-Cambodian border and sovereignty disputes.

In the intervening World Heritage Committee meetings leading to the 2011 Thai "withdrawal," the growing tensions amongst the various World Heritage actors further



eroded the ability of the body to effectively deal with the Preah Vihear situation. Many World Heritage participants identified the Brasilia World Heritage Committee meeting in 2010 as a turning point, with heavy contestation of proposed decisions and a systematic reversal of the Advisory Body proposed decisions by the committee. In the fateful 2011 meeting in Paris, a full 22 sites were inscribed against the initial recommendation of the Advisory body.<sup>76</sup> Each of these debates followed the model previously described and greatly delayed the work of the committee. It is likely that this contentious atmosphere and time pressure caused the Preah Vihear agenda item being brought forward in plenary session before a consensus text had been agreed between Thailand and Cambodia, thus contributing to the Thai walkout.

### **UNESCO and the World Heritage Community as a Forum for Mediation**

In the aftermath of the inscription and related border violence, the journalistic and heritage professional worlds have generally placed the blame on UNESCO or the World Heritage Committee as a whole: UNESCO “shouldn’t have” inscribed the site or the World Heritage Committee “should have known better.” Helaine Silverman wondered why UNESCO didn’t work for an obvious solution:

*“A better solution in July 2008 would have been for UNESCO to have worked with Cambodia and Thailand to create a trans-border World Heritage Site, declaring that when two countries dispute ownership of a border site and when a diplomatic crisis (possibly with violent repercussions) will result from a World Heritage List inscription, and when there have been initial, productive binational discussions of cooperation for the development/ management of a contested site, UNESCO will not award the World Heritage designation to a single country but rather confer a borderless status, assisting the two countries to prepare dual access routes to the site*

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<sup>76</sup> Personal observation, World Heritage Committee (2011).

*with appropriate passport control. The UNESCO flag and the flag of both countries would fly over the site.*<sup>77</sup>

This type of critique illustrates a widely-held misunderstanding of how UNESCO works in the heritage preservation community and public at large. UNESCO as an institution makes no decisions. It executes the decisions taken by its member states. It was the 21 states of the World Heritage Committee who decided to inscribe Preah Vihear not UNESCO's Director General, and even if she was adamantly opposed, there the Director General has no authority on site inscription decisions. However a profitable analysis can be undertaken by posing the question: when "why didn't the states parties to the World Heritage Convention and World Heritage Committee members behave differently and try to broker a successful mediation?" The World Heritage Convention provides a forum for 190 states to interact with each other and international civil society and heritage experts and develop viable policy options. Yet this network of states and preservation experts, which could have acted as third party mediators, failed to provide a credible political option for Thailand and Cambodia to defuse their bilateral impasse. The reason lies in two main areas: a lack of World Heritage Actors taking responsibility for resolving the situation and the temple dispute not being seen as a geo-political priority by states.

What is notable about World Heritage Actors is that none perceive it is their primary responsibility to resolve the situation. Members of the advisory bodies feel that they discharged their responsibility by analyzing the site nomination according to the Operational Guidelines and recommending against inscription. Fault therefore is with the World Heritage Committee members who overruled their recommendations. The World Heritage Centre, facing criticism that UNESCO should act, point out the efforts of the Director General and

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<sup>77</sup> Silverman, 15.

World Heritage Center in the spring of 2011 to mediate, but they have no power to impose anything and it is up to the States Parties to give them a mandate to act. The observed behavior of the 190 States Parties and 21 committee members in 2011 indicate that they felt they had no responsibility or legitimacy in getting involved in the issue. Preah Vihear should be settled between Thailand and Cambodia with the UNESCO secretariat or the World Heritage Center providing mediating services. In addition, Thailand has consistently insisted that the matter is a bi-lateral dispute, further detouring outside states from getting involved. In the words of one western official, “the only thing you get out of trying to break up a food fight is a pie in the face.”

All actors also perceived that this dispute lay fundamentally outside UNESCO’s competence, and therefore responsibility. Citing article 11, section 3 of the World Heritage convention, UNESCO decisions have no bearing on legal status of disputed sites.<sup>78</sup> That responsibility lies with the ICJ. In addition, Thailand’s position has been hampered by the widespread feeling, though not universal, that the issue had been settled in 1962, and Thailand was being unreasonably political.

Yet despite these frictions amongst the institutional actors, there is a consensus that the issue is serious and needs to be addressed. The potential for unity of action was on display when the Preah Vihear agenda item came to the floor during the 2011 session. Faced with the possibility of an open breakdown of a Thai-Cambodian consensus text and a Thai withdrawal, committee members (particularly the Swiss delegation) maneuvered to gain as much time to salvage the decision. When no solution was found and Thailand withdrew from the committee meeting, it was clear to the observer that all participants were disgusted by the outcome. The breakdown didn’t occur because the individuals in the national delegations

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<sup>78</sup> UNESCO, World Heritage Convention.

didn't want act, but that they did not have authorization from, or were expressly forbidden by, their capitals to take a position. In the final analysis, the actions taken at UNESCO are not driven by the decisions or will of the local institutional actors in national delegations, the World Heritage Centre, or Advisory Bodies, but by the political priorities defined by the government of each member state according to its political reality. Ultimately UNESCO's failure to help mediate the Preah Vihear situation is because apart from Thailand and Cambodia, the issue is not seen as meriting the high level political effort needed for international mediation.

### **Cosmopolitan Civil Society Coordinating Cosmopolitan Political Solutions**

The lack of political interest for the Preah Vihear dispute contrasts strongly with the attention given to another disputed World Heritage Site: The Old City of Jerusalem and its Walls. Since its inscription in 1982, the Old City of Jerusalem has been a reoccurring flashpoint in the wider Israeli-Palestinian dispute with both sides using the World Heritage Committee as a forum to advance their claims on the wider region. Yet despite the constant potential for an open conflict, along the lines of Preah Vihear, the World Heritage Committee has been effectively managing the situation for decades. The annual ritual of the "Middle East Sites" has become a fixture of World Heritage Committee meetings. Interested states including the United States, members of the European Block, and the Arab Group, prepare consultations and advance negotiating positions up to a year in advance of the committee meeting. During the committee, the item is typically placed near the end of the two week session to allow for intensive "hallway" consulting on a consensus text. When the item is finally opened on the committee floor, there is generally no debate. The consensus text is either adopted, or a decision is taken by vote and followed by prepared statements.

This annual ritual has succeeded in managing the delicate political situation, but requires a great deal of effort from all World Heritage Actors to succeed. Jerusalem merits that effort because civil society actors and interest groups make it a significant issue within the domestic politics of the United States, Israel, European, and Arab States. This domestic pressure forces foreign ministries to take a position on the issue which translates into concerted action by national delegations at the World Heritage Committee. Preah Vihear, on the other hand, lacks these political advocates interested in the issue. There is no analogous force lobbying in national capitals for a push to broker a joint management compromise, and so the Preah Vihear dispute drifts along.

Realistically, the global community of archeologists and heritage preservation professionals are the only natural civil-society group that is likely to be interested in pressuring governments for a UNESCO based multi-lateral solution. They are historically the primary advocates for making heritage preservation a global governance priority, they are the experts most qualified to generate and assess proposed joint site management plans, and they occupy an official role in the World Heritage Convention through the Advisory Bodies. Indeed, the World Heritage Convention owes part of its existence to the concerted efforts of global preservationists who pioneered a model for international cooperation in heritage preservation during the UNESCO Nubia Campaign of 1959-1980.<sup>79</sup>

In 1954, the Egyptian government announced the construction of the Aswan High Dam, which threatened to flood a series of ancient Egyptian temple sites in the Upper Nile with flooding. Egypt made an initial request to UNESCO in 1955 for international assistance in recording and taking samples of the sites before they were flooded. The initial group of

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<sup>79</sup>UNESCO, "Monuments of Nubia-International Campaign," *UNESCO.ORG*, UNESCO Paris. Accessed online 02/06/2013, <http://whc.unesco.org/en/activities/172>.

experts on the ground quickly took the initiative and advocated for a more robust plan to disassemble the temples and move them to higher ground. Lead by French Egyptologist Christiane Desroches-Noblecourt, Egyptologists around the world began formally and informally lobbying for the rescue plan in the press and foreign ministries.

By 1959, the rescue lobbying effort had reached a level that the Egyptian delegation officially asked UNESCO to help coordinate a rescue effort. On the 8<sup>th</sup> of March 1960, UNESCO officially issued a call for an international effort to save the sites. Thanks to Noblecourt's efforts, France was one of the first countries to respond to the call, despite the fact that official diplomatic relations between France and Egypt had been severed since the 1956 Suez Crisis.<sup>80</sup> The United States was initially reluctant to participate having already refused to help Egypt finance the dam project and fearing that Egypt was passing into the Soviet Union's orbit. Gradually through growing public awareness surrounding the effort and the lobbying of U.S. preservationists, including the U.S. Committee for the Preservation of Nubian Monuments, the U.S. government's position shifted to support of the project. By 1963, final U.S. participation and financial support for the project had been secured. Once in operation, UNESCO helped coordinate and implement the rescue of thousands of sites in the Upper Nile Valley and the Abu Simbel and Philae Temple complexes before the waters of Lake Nasser covered them in 1968. The Nubia Campaign is considered by many to be UNESCO's "finest hour," and in its wake this new global heritage preservation community sought to enshrine a mechanism for preserving the world's outstanding heritage sites which ultimately resulted in the World Heritage Convention.<sup>81</sup>

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<sup>80</sup> Maurel, 283-287.

<sup>81</sup> Maurel, Ibid.

A successful effort for a UNESCO brokered mediation to the Preah Vihear Temple dispute would likely need a similar long-term and committed lobbying action by anthropologists, archeologists, site managers, local residents, business leaders and other members of global civil society who are concerned about Preh Vihear's preservation and a peaceful resolution to Cambodia and Thailand's outstanding border disputes. Formal action at UNESCO and on the floor of the World Heritage Committee would be the end of the process and would be possible only if advocates had succeeded in making the issue sufficiently important in national capitols for concerted state action to be taken. Once this lobbying has been successful, then efforts could be directed to informal diplomatic consultations between a "Friends of Preah Vihear" group and the conflicting states to develop a mutually beneficial way forward. The current state of impasse between Thailand and Cambodia, with Thailand currently rejecting multi-lateral mediation, means that any prospective mediator will probably need to flex some diplomatic muscle to bring the two sides to a serious negotiating table. Only the continual pressure by preservation civil society would ensure the mediating states continue to make the effort. Assuming that preservationists can raise the profile of the issue high enough for state action to be taken, then a Silverman style "borderless site" solution can be attempted by World Heritage Committee.

Would such UNESCO based solution be worth the effort? Should the issue remain a bi-lateral dispute that is resolved by an ICJ ruling? This examination suggests otherwise. The Preah Vihear dispute is a highly volatile issue in the domestic politics of both Thailand and Cambodia, and both governments therefore cannot be seen to cede an inch of national territory. This, combined with bad feeling between Thais and Cambodians dating back to the Cambodian Civil War, has forced both governments to take maximalist positions. In this zero-sum bi-lateral dispute, the 1962 ICJ ruling and the 2008 decision to inscribe the temple

on the World Heritage List not only failed to resolve the dispute but further inflamed domestic public opinion on both sides. It is unknown who the ICJ will rule for, but it is clear that the ruling will cause potentially serious domestic political unrest for the losing state.

By contrast, the UNESCO brokered Silverman solution of a “borderless” status creates a viable political alternative. Instead of a process that rules that one side has sovereignty and the other does not, this solution allows both sides to claim the temple zone and then voluntarily cede the territory around it to create this international space dedicated to peace and understanding. This allows both governments to maintain the position that they have not ceded territory to the other; each has exercised their sovereign right to donate territory to create this international space. This mutual session principle would also allow the site boundaries and buffer zones to be expanded in order to address the preservation concerns voiced by ICOMOS and World Heritage Committee decisions. Ultimately this process could encourage joint Thai-Cambodian listing of the ensemble of ancient Khmer temples in the border zone and restart the process of joint border demarcation.<sup>82</sup>

Beyond the benefits of a UNESCO brokered approach in improving Thai-Cambodian relations, such an effort would be good for the soul of UNESCO. As illustrated in chapter one, the organization’s primary purpose is to encourage and facilitate cooperation and understanding amongst the governments and peoples of the world. The World Heritage Convention was created to help coordinate joint action as much as it was to delineate and enforce cosmopolitan rules of heritage preservation. While rules are necessary, they are increasingly ossifying the organization. Much of the reaction of World Heritage Actors to the Preah Vihear situation has been overly constrained by rules and an attitude of “only that

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<sup>82</sup> Silverman, 15-16. Silverman suggests that there is fertile ground for Thai-Cambodian cooperation in joint development of Khmer Temples in the border zone for heritage tourism.



which is expressly authorized in rule is possible.” If this continues, the World Heritage Convention will increasingly become the rigid legal straightjacket that increasingly no longer reflects the political consensus of its members. Carr warns us that a long term lack of consensus inside a system of international governance could lead groups of states to abandon the institutional framework, fatally wounding the universal framework of global governance. A robust UNESCO based response to the Preah Vihear dispute would help the organization rediscover its role as an active agent for promoting cosmopolitan values and solutions to the challenges of our times.

## Conclusion

UNESCO is frequently overlooked by international affairs academics. It is most often covered as a subsidiary subject worthy of inclusion in chapters describing U.N. specialized agencies in international relations textbooks. Proponents of cosmopolitan theory focus, justifiably, on issues of conflict, human rights protection, and the creation of institutions like the European Court of Human Rights and the International Criminal Court. The potential influence of an organization specializing in education, science, and culture in the wider debates of international affairs is not immediately apparent for most observers.

To the extent UNESCO has been the subject of scholarship, its cosmopolitan orientation has been treated along two major lines. First, as embodied by Clare Well's *The U.N., UNESCO, and the Politics of Knowledge*, the cosmopolitan themes of UNESCO's founding documents are interpreted as representing a normative discourse of the dominant powers that established the post-1945 world order.<sup>83</sup> The analysis focuses on how political life amongst UNESCO states is shaped as emerging and non-dominate powers both challenge and seek to modify the original discourse in order to advance their cause of modifying existing power relationships in the international system.

Second, more cosmopolitan minded scholars and observers, such as Chloé Maurel in her history of UNESCO's first twenty years, analyses the performance of the organization in function of its own stated normative goals and the broader cosmopolitan perspective.<sup>84</sup> These observers tend to be disappointed with the inability of UNESCO's actions to match its rhetoric. It fails its cosmopolitan mission primarily due to the fact that states still retain too much power and "politicize" the decision making process to such an extent that the

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<sup>83</sup> Wells.

<sup>84</sup> Maurel.

realization of truly cosmopolitan outcomes is considered structurally impossible. As long as states retain dominant control over decision-making and funding the organization cannot be truly cosmopolitan.

This thesis has tried to bridge these two essentially realist and cosmopolitan modes of analysis in examining the experience of the Preah Vihear dispute. It starts from the Kantian basis that a global assembly of “republican” states who voluntarily submit themselves to the rules developed by the whole community is the most realistic way of creating a cosmopolitan global governance structure. UNESCO, and specifically the World Heritage Convention, is presented as a concrete example of an attempt to put this model into practice. The experience of Preah Vihear is used to illustrate the challenges and opportunities that arise when the institutional structure is confronted with the harsh reality of an international conflict.

The Temple of Preah Vihear dispute clearly represents a failure for the World Heritage Convention. International involvement in the World Heritage context exacerbated an existing conflict, helped place heritage of universal value that the World Heritage Convention is charged with protecting at risk, and proved incapable of producing a viable cosmopolitan solution to protect the temple and calm tensions between Thailand and Cambodia.

However, it is hard to say that this failure is due to the structure of the World Heritage Convention not being sufficiently cosmopolitan. The system of decision-making, regulation, cosmopolitan oversight, and balance of power between states holding legitimate legal authority, the cosmopolitan functionaries of UNESCO, and independent civil society input is difficult to improve upon. It's not at all clear that if the balance of power was shifted more towards the World Heritage Center of Advisory Bodies that the system would become any more “cosmopolitan.” States may pose significant problems in being considered to accurately

represent popular will and capable of being cosmopolitan agents, but the Advisory Bodies and the World Heritage Center have an even less credible claim that they should be entrusted primary responsibility in developing and implementing universal norms. In any event, nothing in the formal institutional structure prevented the development of a mediation effort for the Preah Vihear dispute.

The failure is therefore not of the cosmopolitan institution but rather a failure of “cosmopolitan politics” within the institution. The World Heritage actors collectively failed to develop a viable political option for joint management of the site between Thailand and Cambodia. Even in the absence of the border dispute, a trans-border management arrangement should have been encouraged because cultural features that give Preah Vihear its outstanding value are on both sides of the border. Given the intractable conflict where both sides seek to have their claim to Preah Vihear recognized, the cosmopolitan solution of an international preservation zone under joint management is the only way to simultaneously recognize Thai and Cambodian claims while preserving the entirety of Preah Vihear’s universal value.

The political failure has been due to a lack of sustained leadership for a cosmopolitan solution. States parties to the convention either don’t want to get involved or view the issue as a bilateral dispute. UNESCO and the World Heritage Center have made calls for the two sides to resolve the dispute but are hesitant to push for a more robust mediation effort without a clear mandate from member states. The Advisory Bodies view their role as restricted to strictly interpreting operational guidelines. This has led to the not helpful attitude of “it should never have been inscribed in the first place” rather than the development by the experts of viable cosmopolitan policy alternatives.

The Preah Vihear failure therefore boils down to a lack of leadership. The creation of a robust legal framework is no guarantee of a more cosmopolitan world. Like any tool, it needs to be used properly. If there is no leadership for cosmopolitan international organizations to live up to their ideals, then more nationalistic solutions to international political disputes will become the norm by default. This has been the case with Preah Vihear. This is a rising trend within the World Heritage Committee. This observation is most likely valid for the rest of the international system. We live in a world with institutions that make cosmopolitan governance possible. Finding the political will and leadership to make this ambition a reality is the real cosmopolitan challenge moving forward.

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