

International legal Review of human rights and World Heritage: tentative lessons?

POLICY MESSAGE

This initial review reflects the reality that the much needed dialogue between legal research centered around human rights and the rights-based approach the WH community is only beginning. Thus, it relates issues, topics, and questions identified as pertinent so far and proposes concrete contributions by legal researchers to the overall dialogue.

Legal research can contribute both normative and qualitative information on legal standards, and is well placed to ensure that policy recommendations are compliant with positive legal obligations, both international (human rights and sustainability-related as well as general public international law) and domestic (constitutional, see e.g. Nepal) of all actors involved in WH protection. It will contribute concrete guidance for future WH legal and policy texts enshrining human rights and sustainability as either binding legal obligations or integrated elements of policies related to WH protection.

The initial legal review has identified multiple layers of relationships, both between WH and human rights standards at the international plane, by the realization of both at the national level, and by the presence (or absence) of a normative hierarchy as well as an institutional framework for implementation at the state level. These relationships are explored on the basis of four clusters of rights.

Progress at the international plane is identifiable in that the WH systems has begun to explicitly embrace the rights-based model in recent decisions, especially the 2015 amendments to the Operational Guidelines and decision 39 COM 5D. This and the positive reception of the Caux conclusions by the WH community serves as evidence that the dialogue shall continue.

On the national plane, normative inconsistencies as well as missing or flawed mechanisms for the realization of rights (generally and specifically) in World Heritage processes appear to pose the main problem for the future. These lacunae are not heritage-specific, but rather extend to a general lack of domestic realization of human rights obligations through effective means. In the WH context, this relates principally to the right to participation in both the selection and management of sites (e.g. Vietnam, Philippines) by the affected or concerned communities (and diversities, e.g. Nepal), the sub-issue of minority rights protection (e.g. Vietnam), and the 'proportional inclusion' of ethnicities in all relevant processes and bodies (e.g. Nepal). This translates directly into a bigger question, namely who should be the beneficiary of heritage protection or, as certain researchers stipulate it: "whose heritage is it, anyway?" The dichotomy of universal and local values is inherent in that question, and this in turn is a legitimate question from a rights point of view.

Initial findings suggest that remedying structural legal problems is of primary importance; this encompasses in particular non-existent legal norms governing WH processes on the domestic plane and policies that exclude rather than embrace the participation of communities and ethnic groups; this in turn has repercussions on the sustainability of the WH protection efforts in the countries concerned as a whole. In part, the relative novelty of human rights and sustainability considerations in domestic law seems to be the cause; for this, international law can provide relevant, binding minimum standards.

Object and Purpose of the Legal Review

The work of the legal researchers involved in the project explores the "key rights issues being articulated in national and international heritage standards, legislation and policy frameworks" and analyzes "the legal implementation factors at different levels preventing or enhancing the realization of rights"; it furthermore contributes to developing a framework for strengthening the rights based approach in world heritage work. As such, the legal analysis is integrated in the overall project both by providing normative and qualitative information on legal standards, and by ensuring that policy recommendations are compliant with

positive legal obligations of all actors involved in WH protection. The legal research venture is dependent upon intense dialogue with the WH experts from all disciplines, and thus is not expected to procure isolated, but integrated results.

Interrelationships - of WH and Human Rights Law, and Layers of Law

The laws (international, and derivative national constitutional and sub-constitutional norms) on WH protection and on human rights are interrelated on multiple levels. Graph 1 depicts these complex relationships, which are enriched (and complicated) by the fact that WH law at least implicitly secures 'rights' both to individuals and groups, in addition to

objects, namely cultural and national heritage.

Further, initial research clearly indicates that the relationship between varying levels of the law is of the essence. Thus, how international norms are transposed into national law, at what level, and with what authority, as well as the existence and operations of national institutions of both human rights protection and WH law implementation are crucially important. WH implementation at the national plane, at least as regards the countries studied, seems to be less normative, and more policy-based, thus leaving a substantial lack of legal clarity and certainty, which is problematic from a rights-based perspective, and adversely affects both

procedural and substantive justice, as well as the perception thereof. The institutional framework, the constitutional parameters, and the political realities within which law functions are thus at the center of the research, which by definition is interdisciplinary.

Clusters of Rights Examined

In line with a preliminary review of what rights issues are particularly prevalent in the WH context, the legal teams focus their research on the following clusters of human rights:

Fair hearing and participation / FPIC: This cluster links procedural fairness in disputes (civil, criminal or administrative) and participatory fairness (regulatory decision-making in the broadest sense). Included are the rights to an impartial and independent tribunal, to fairness and speediness of hearings, to appeal, to procedural and substantive equality before the law, as well as rights to petition and political participation in matters that pertain to a person or group of persons. In the WH context, this extends in particular to the designation, planning and management of sites, but also to the overarching political process of identifying and expressing cultural identity (to which the preservation of natural heritage very much belongs) by rendering particular sites worthy of internationalized protection, and others not. The scope of the duties is currently evolving. In any event, the WHC has taken a quite significant step in 2015 by incorporating FPIC as a legal requirement for a Guideline-conforming domestic designation process

Resources and property: Here, questions such as how the law protects real and intellectual property, both personal and collective/communal, including against interferences by non-state actors; how private and public interests are balanced in property disputes; what the relationship between private and communal property is, are being examined. This area has given rise to probably the most human rights litigation before international tribunals to date, and is likely to dominate the future discussion. Pre-emptive measures common under WH law appear at first sight to entail substantial limitations and restrictions on property and its free use and would have to be justified by a rather high standard of concrete necessity and proportionality under human rights law. Thus, broader and more programmatic approaches to balancing the competing values are called for.

This cluster encompasses the right to development, livelihood, and cultural/group identity: the recognition of individuals and groups with respect to their livelihood and autonomous development decisions; the balancing of these rights against state and other public interests, and the value placed on diversity as an independent value or right. Neither the WHC, nor any other international legal instrument can be used as a tool to keep anyone as a “museum people” or as an excuse to deny them the most basic services to live a dignified life. There can be no cultural or group identity if the group in question lives deprived of the means to sustain themselves and their future generations. The WHC should be interpreted in such a way as to enable communities to continue making use of their traditional means of subsistence and, through the newly gained revenues, support those means and techniques, which are least obtrusive to the preservation of the heritage site

The final cluster deals with indigenous/tribal/ ethnic (ITE) minority rights, including the history of the ethnic make-up of societies and the implications for WH protection. Human rights law recognizes the need to protect diversity, sometimes even against a self-proclaimed and sincere will to assimilate and dissolve in the interest of personal advancement. Minority and indigenous rights operate in a delicate field of preservation for the greater good vs. self-determination, including the right to shed one's ancestry in favor of modernization and inclusion.

Initial Findings

The International Dimension

While there is remarkably little in terms of direct cross-referencing at the international law-making level between the WHC and human rights, interrelationships exist. In the July 2015 revision of the Operational Guidelines, the WHC has explicitly stated “aligning the World Heritage Convention and its implementation with other international instruments” as one driving purpose. Amended para. 111 of the 2015 Operational Guidelines stipulates the use of participatory planning and stakeholder consultation process and the “development of mechanisms for the involvement and coordination of the various activities between different partners and stakeholders and introduces “an assessment of the vulnerabilities of the property to social, economic, and other pressures and changes.” Para. 123 secures participation rights to “local communities,

indigenous peoples, governmental, non-governmental and private organizations and other stakeholders.” States are nudged on to “demonstrate that their *free, prior and informed consent* has been obtained, through, inter alia making the nominations publicly available in appropriate languages and public consultations and hearings.” This incorporates a strong formal human rights-based obligation at least in the nomination stage.

Bonn decision 39 COM 5D and General Assembly Resolution 20 GA 13, adopting a general policy of securing rights-based sustainable development approach in WH protection is further evidence that WH policies are increasingly taking cognizance of the need to explicitly mainstream general UN policies in that field into their work.

The National (Constitutional) Dimension

On the national plane, initial findings indicate that problems may, in some countries studied, lie primarily in

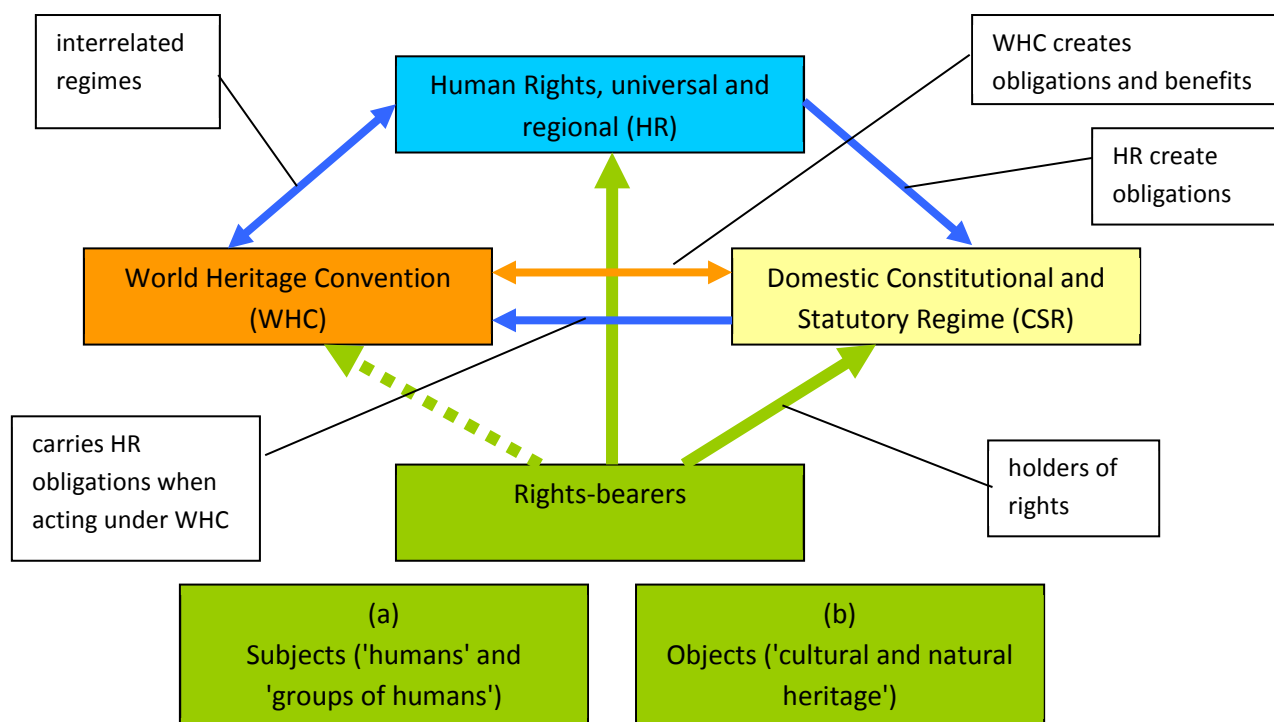
- a) a lack of general normative provisions securing both processes [including participation] and substance of WH site designation and operations [including individual and collective rights], or inferior implementing norms, and
- b) a lack of inadequacy of institutions entrusted with implementing rights.

In substantial part, this is due to changes in the constitutional frameworks and political realities [democratic transitions, both sudden [e.g. Nepal] and long-term [e.g. Vietnam]] as well as the perception of international legal obligations within these countries. Also, varying degrees of willingness and ability of national judiciaries to step up and enforce rights effectively were detected (again, partly influenced by changing constitutional realities to which these judiciaries have yet to adapt or, as in the case of Nepal, simply have not had any time, and thus opportunity to express a position), and have a direct bearing on the outcomes, also in the WH context. Lacunae and inconsistencies are generally not WH-specific, but emanate from a generally incomplete system for rights protection. A comparison of these countries with others, where for internal or external grounds no such problems persist, is desirable.

The National – International Divide

As in many realms of public international law, a dividing line between international obligations and their realization at home is prevalent in WH law. Given the UN Charter and Bill of Rights, this is perplexing at least as far as human rights are concerned. Heritage protection offers a unique opportunity for positioning rights in the state-international community dialogue that is much more apparent and results-generating than elsewhere, where individual and group rights are being advocated. Participatory rights and the related duty of both states and international organizations to engage in a meaningful dialogue are evident. International human rights law here can

serve not only as inspiration, but as a minimum standard which, in the WH context, could well be beneficially expanded. Thus, WH practice should by no means shy away from interacting with human rights law, but rather embrace the opportunity to contribute to furthering rights protection. National law is, as always, both a partner in the dialogue and, ultimately, the duty-bearer when it comes to complying with international obligations.



POLICY IMPLICATIONS RESEARCH

Subject to further programming, the following additional legal research ventures, which would also generate legal documents relevant for policy are advisable. These have been designed with the fact that WH law and policy is uniquely positioned within the realm of UN law to give full effect to the existent human rights and emerging sustainability regimes of the world organization in mind. Regional human rights regimes should be seriously taken into consideration as well, given that – despite the scarcity of case law to date – it is likely that heritage matters will give rise to proceedings in these fora; this also includes specialized regimes, e.g. on minority and indigenous rights.

- A draft text that mirrors the Bonn document on sustainability and addresses rights protection in the heritage context (after a dialogue with the WH experts), possibly with commentary;

- An annotation to the sustainable development policy, and Operational Guidelines amendments and their explicit and implicit repercussions from the rights-based point of view, and/or

- A draft amendment to certain provisions of the Operational Guidelines enshrining rights protection as a discussion document for future WHC processes.

Beyond that, the dialogue between WH and the human rights world should be enhanced and formalized. Bearing in mind that the object and purpose of both regimes are closely related and overlap extensively, this is an inescapable conclusion. What formal, normative outcome – if any – may be desirable remains to be seen. More importantly, an increased understanding between the protagonists giving effect to the relevant treaties will in itself be a significant progress.

Author information and contact details

Prof. Dr. Alexander Morawa

Professor of Comparative and Anglo-American Law

University of Lucerne, Switzerland

alexander.morawa@unilu.ch

Gabriel Zalazar MLaw

University of Lucerne, Switzerland

gabriel.zalazar@unilu.ch



UNIVERSITÄT
LUZERN