

HEAVEN OR EARTH: The Hagia Sophia Re-Conversion, Turkish and International Law, and the Special Case of Universal Religious Sites

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ABSTRACT

The Hagia Sophia has stood as one of the greatest religious buildings in the world for nearly 1,500 years. During this time, it has taken many forms, first as a church and then a mosque, before finally becoming a museum in 1934. But in July 2020, the Turkish president, Recep Tayyip Erdoğan, converted the Hagia Sophia back to a mosque following a ruling by the Turkish Council of State. This re-conversion was received with outrage across much of the world, but whether the decision was legal poses a much more difficult question.

This article analyzes Turkish domestic law and international law to conclude that there are grounds for questioning the legality of the Hagia Sophia's re-conversion. It then addresses the need to better protect universal religious sites like the Hagia Sophia in the future. The Council of State relied on principles of the Islamic waqf endowment structure to declare the museum status of the Hagia Sophia illegal. But, in reality, waqf legal doctrine has been dynamic throughout history. Separately, the Turkish Constitution holds secularism as one of its greatest principles, which the re-conversion of the Hagia Sophia, cloaked with religious importance and symbolism, would seem to violate. On the other hand, international law on cultural heritage, freedom of religion, cultural rights, minority rights, and conquest provide much weaker constraints on the changed status of the Hagia Sophia. This is concerning given that Hagia Sophia is not the only universal religious site—a place of shared religious importance for two or more religions—in need of protection due to its unique history. In light of this, a future treaty on universal religious sites or the expansion of freedom of religion under the International Covenant on Civil and Political Rights could provide potential vehicles for such protection.

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INTRODUCTION

Entering the great sanctuary, streams of light float down from the dome as if it is the light of heaven itself. The intricate mosaics of Christ, the Virgin Mother, and Byzantine emperors and empresses sparkle as the sunlight reflects off them. For a millennium, the Hagia Sophia in Constantinople was the greatest church in Christendom, the ultimate monument of the Byzantine Empire. Medieval Jewish traveler Benjamin of Tudela concluded that “[a]ll the other places of worship in the whole world do not equal St. Sophia.”¹ Following the conquest of Constantinople by the Ottoman Empire, Mehmed the Conqueror re-consecrated the building as a mosque. For nearly 500 years, the Hagia Sophia was one of the most important houses of worship in the Islamic world. Roundels inscribed with the names of Allah, Muhammad, Muhammad’s grandsons, and the four Rashidun caliphs, and the minbar at the head of the sanctuary demonstrate some of the Islamic additions during this period. Then in 1934, the modern Republic of Turkey made the Hagia Sophia a museum, neither Christian nor Muslim, but a place which people of all faiths could freely visit.

1. MANUEL KOMROFF, CONTEMPORARIES OF MARCO POLO 265 (1989).

But in July 2020, the Hagia Sophia was re-converted into a mosque by the Turkish government.² Driven by religious and political motives, the Turkish government signed the conversion into law after a Turkish court declared the use of the Hagia Sophia as a museum illegal.³ The conversion sparked international outrage, with churches,⁴ Islamic organizations,⁵ foreign governments,⁶ and international bodies condemning the action.⁷ Several critics even labeled the act a violation of international law.⁸

Due to the recency of the re-conversion, legal analyses of the case have been lacking. Analyses that were published have often been in the form of shorter online articles focusing on the broad picture of the Hagia Sophia re-conversion or a single element of international law.⁹ More comprehensive legal articles have focused on religious spaces more generally.¹⁰ The article to address the re-conversion in the most detail concluded that it was legal; however, that article only addressed the Hagia Sophia decision in light of waqf law rather than Turkish law more broadly or international law.¹¹ This article, instead, offers a comprehensive analysis of the Hagia Sophia re-conversion case and the potential issues with that decision under both Turkish and international

2. Merrit Kennedy & Peter Kenyon, *Turkey Converts Istanbul's Iconic Hagia Sophia Back into a Mosque*, NPR (July 10, 2020, 10:37 AM), <https://www.npr.org/2020/07/10/889691777/turkish-court-ruling-clears-way-for-hagia-sophia-to-be-converted-to-a-mosque>.

3. Daniştay, Esas No. 2016/16015, Karar No. 2020/2595 (2020) [Council of State Journal, 2020].

4. AFP, *Pope Also Condemns Hagia Sophia Conversion*, GLOBAL VILLAGE SQUARE (July 13, 2020), <https://www.globalvillagespace.com/pope-hagia-sophia>.

5. Paul Antonopoulos, *Islamic Society of North America Condemns Turkey's Conversion of Hagia Sophia*, GREEK CITY TIMES (July 14, 2020), <https://greekcitytimes.com/2020/07/14/islamic-society-of-north-america-condemns-turkeys-conversion-of-hagia-sophia>.

6. *EU Condemns Turkish Decision to Convert Hagia Sophia Back to Mosque*, CGTN (July 14, 2020, 11:12 AM), <https://news.cgtn.com/news/2020-07-14/EU-condemns-Turkish-decision-to-convert-Hagia-Sophia-back-to-mosque-S75op40nx6/index.html>.

7. *UNESCO Statement on Hagia Sophia, Istanbul*, UNESCO (July 10, 2020), <https://en.unesco.org/news/unesco-statement-hagia-sophia-istanbul>.

8. See, e.g., *MECC: Hagia Sophia Decision Is a Violation of Religious Freedom and Coexistence*, GLOBAL MINISTRIES (July 13, 2020), https://www.globalministries.org/mecc_hagia_sophia_hagia_sophia_decision_is_a_violation_of_religious_freedom_and_coexistence.

9. See Muratcan Isildak, *Domestic and International Law Size of Hagia Sophia Decision*, MOD. DIPL. (July 16, 2020), <https://moderndiplomacy.eu/2020/07/16/domestic-and-international-law-size-of-the-hagia-sophia-decision>; Lando Kirchmair, *Turning Hagia Sophia Into a Mosque (Again) Has International Law Anything to Say About That?*, VÖLKERRECHTSBLOG (July 21, 2020), <https://voelkerrechtsblog.org/turning-hagia-sophia-into-a-mosque-again>; Spyros Vlachopoulos, *Hagia Sophia: How European Human Rights Laws Are Being Violated*, EKATHIMERINI (July 21, 2020, 8:30 PM), <https://www.ekathimerini.com/254913/opinion/ekathimerini/comment/hagia-sophia-how-european-human-rights-laws-are-being-violated>.

10. See generally Leonard Hammer, *Cultural Heritage Protection and Sacred Spaces: Considering Alternative Approaches from Within the Human Rights Framework*, 49 COLUM. HM. RTS. L. REV. 73 (2018).

11. See generally *The Hagia Sophia Case*, 134 HARV. L. REV. 1278 (Jan. 11, 2021).

law. Furthermore, it offers a suggestion for how to better protect spaces of shared religious importance, such as the Hagia Sophia, moving forward.

In Part I, this article will recount the storied history of the Hagia Sophia, first as a church, then a mosque, and finally as a museum. Part II will describe the re-conversion of the Hagia Sophia, including legal precedents found in the re-conversion of Byzantine churches in Turkey, and international reactions. In Part III, this article will provide a legal analysis of the Turkish court decision that the re-conversion was premised upon, as well as two potential grounds for questioning the correctness of that ruling, namely the Islamic endowment structure of the waqf and the strict separation of religion and state under the Turkish Constitution. Part IV will analyze the re-conversion from an international law perspective, addressing how the re-conversion squares with the European Court of Human Rights, the World Heritage Convention, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and law on conquest. Finding that current international law provides a poor constraint on the modification of religious sites, Part V suggests expanding the protection of universal religious sites such as the Hagia Sophia, either through a new international treaty or an expanded reading of the right to freedom of religion. Lastly, the Conclusion provides final thoughts.

I. HISTORY OF THE HAGIA SOPHIA

The Hagia Sophia, called *Αγία Σοφία* in Greek and *Ayasofya* in Turkish, is one of the most notable monuments in Turkey today,¹² if not the entire world. Its long and storied past has made it an important site for Christians and Muslims, as well as for the global population. The Hagia Sophia is also the most visited tourist attraction in Turkey, with over three million visitors in 2019 alone.¹³

Located in Constantinople, the capital of the Byzantine Empire,¹⁴ the Hagia Sophia would have been the most important building in the entire empire. However, the present Hagia Sophia was not the first church to stand on this site. The first two churches at the location were destroyed during riots

12. *Hagia Sophia Still Top Tourist Attraction*, HÜRRİYET DAILY NEWS, <https://www.hurriyetdailynews.com/hagia-sophia-still-top-tourist-attraction-151702#photo-1> (last visited Aug. 16, 2020).

13. *Hagia Sophia Visitors to Reach Three Million Threshold in 2019*, HÜRRİYET DAILY NEWS (Oct. 22, 2019, 2:47 PM), <https://www.hurriyetdailynews.com/hagia-sophia-visitors-to-reach-three-million-threshold-in-2019-147818#:~:text=Over%20the%20course%20of%20the,Ottomans%20was%202%2C226%2C159%20in%202007>.

14. Byzantine is a modern term, as the Byzantines referred to themselves as Romans throughout their history. However, I shall use the term Byzantine due to its more common understanding among readers. See generally ANTHONY KALDELLIS, *ROMANLAND: ETHNICITY AND EMPIRE IN BYZANTIUM* (2019).

by the city's populace.¹⁵ Undeterred, the Byzantine emperor Justinian I (r. 527–565) built a new church in its place, a church that was to surpass all that came before it. Justinian incorporated spolia, or pieces of old structures, from pagan buildings into the new church to partially represent the triumph of Christianity over paganism.¹⁶ As the contemporary historian Prokopios notes,

Justinian built not long afterwards a church so finely shaped, that if anyone had enquired of the Christians before the burning if it would be their wish that the church should be destroyed and one like this should take its place, shewing [sic] them some sort of model of the building we now see, it seems to me that they would have prayed that they might see their church destroyed forthwith, in order that the building might be converted into its present form.¹⁷

To break the boundaries of traditional church building, Justinian hired not architects, but engineers and mathematicians like Isidore of Miletus and Anthemius of Tralles.¹⁸ They designed the church with nearly perfect square proportions (229 by 245 feet internally),¹⁹ but perhaps their most impressive feat was supporting the massive dome on top of the church. Unlike the famous Gothic churches of Western Europe, the dome of the Hagia Sophia does not require the physical support of internal pillars or buttresses, but is instead supported by pendentives, curved triangular vaulting connecting the dome to the lower supporting structure.²⁰ This allows the dome to appear as though it is floating above the church.²¹ As Prokopios remarked, “one might say that its interior is not illuminated from without by the sun, but that the radiance comes into being within it, such an abundance of light bathes this shrine.”²² This dome structure would not be successfully attempted again for a millennium, when the greatest architects of the Ottoman Empire painstakingly worked to replicate it.²³ Although the dome would collapse due to earthquakes in 558 (and partially again in 869, 989, and 1346), it was repaired and made even taller by the architect Isidore the Younger following the 558 collapse. It is effectively his dome model that still stands today.²⁴

The Hagia Sophia was the largest church in Christendom for a millennium until St. Peter's Basilica was built at the Vatican in the sixteenth century. Upon its completion, Justinian exclaimed that he had surpassed Solomon's

15. CYRIL MANGO, *BYZANTINE ARCHITECTURE* 61 (1985).

16. Gülru Necipoğlu, *The Life of an Imperial Monument: Hagia Sophia After Byzantium*, in *HAGIA SOPHIA FROM THE AGE OF JUSTINIAN TO THE PRESENT 195, 196* (Robert Mark & Ahmet Ş. Çakmak eds., 1992).

17. PROKOPIUS, *ON BUILDINGS* 1.22 (H. B. Dewing trans., 1940).

18. *Id.* at 1.24, 1.25.

19. MANGO, *supra* note 15, at 64.

20. *See id.*

21. *Id.*

22. PROKOPIUS, *supra* note 17, at 1.30.

23. MANGO, *supra* note 15, at 61.

24. *Id.* at 64.

legendary feat of building the Temple of Jerusalem.²⁵ Russian ambassadors to Constantinople in the tenth century were so impressed by the church that they reported to their leader,

[W]e knew not whether we were in heaven or on earth. For on earth there is no such splendor or such beauty, and we are at a loss how to describe it. We only know that God dwells there among men, and their service is fairer than the ceremonies of other nations. For we cannot forget that beauty.²⁶

It served as the center of Orthodox Christianity until 1453²⁷ and has indeed remained a spiritual center for Greek Orthodoxy around the world, even nearly 600 years later.²⁸

But in 1453, Constantinople fell to the nascent Ottoman Empire. Upon entering the city, Sultan Mehmed II the Conqueror (r. 1444–1446, 1451–1481) prayed at the Hagia Sophia and had it converted to a mosque.²⁹ Just half a century earlier, Mehmed's great-grandfather, Bayezid I (r. 1389–1402), had dreamed of converting the great church into his primary mosque.³⁰ The conversion was an important symbolic moment of both the Ottoman conquest of the Byzantine Empire, the final vestige of the Roman Empire, and the victory of Islam over Christianity.³¹ The use or conversion of religious buildings by conquerors was not unique to Islam; indeed, Justinian had incorporated parts of pagan temples into the Hagia Sophia³² and in other parts of the world, Christian kings would convert mosques to churches.³³ The conversion of conquered churches to mosques was also an accepted practice in the Muslim world, even if it ran against one of the main privileges of freedom of worship and preservation of worship sites for non-Muslims living as protected subjects of Muslim leaders under Islamic law.³⁴ The practice of converting religious sites in conquered territory to Islamic buildings was also not unique to the Ottomans; the same tactics had been used previously by the Mamluks of Egypt in Palestine

25. Joseph D. Alchermes, *Art and Architecture in the Age of Justinian*, in *THE CAMBRIDGE COMPANION TO THE AGE OF JUSTINIAN* 365 (Michael Maas ed., 2005).

26. NESTOR, *THE RUSSIAN PRIMARY CHRONICLE: LAURENTIAN TEXT* 111 (Samuel Hazzard Cross & Olgerd P. Sherbowitz-Wetzor eds. & trans., 1953).

27. The Hagia Sophia was briefly a Catholic church between 1204 and 1261, when Constantinople was ruled by the Latin Empire following the capture of Constantinople during the Fourth Crusade. See JONATHAN HARRIS, *CONSTANTINOPLE: CAPITAL OF BYZANTIUM* 162–68 (2007).

28. Philip Chrysopoulos, *Hagia Sophia: The Center of Greek Orthodox Faith Through the Ages*, GREEK REP. (Apr. 4, 2019), <https://eu.greekreporter.com/2019/04/04/hagia-sophia-the-center-of-greek-orthodox-faith-through-the-ages>.

29. HALIL INALCIK, *THE OTTOMAN EMPIRE: THE CLASSICAL AGE* 1300–1600 26 (1973).

30. Necipoğlu, *supra* note 16, at 195, 196.

31. See *id.* at 198, 200.

32. See *supra* note 16 and accompanying text.

33. See *infra* note 212 and accompany text (describing the conversion of the La Mezquita, in Córdoba, Spain, to a church during the Spanish Reconquista).

34. Oded Peri, *Islamic Law and Christian Holy Sites: Jerusalem and Its Vicinity in Early Ottoman Times*, 6 ISLAMIC L. & SOC'Y 97, 97 (1999).

and other Muslim powers stretching back to the earlier caliphs.³⁵ However, even the Ottoman sultans understood the grave issues conversion of churches could pose, and one sultan issued a *firman*, or edict, on October 4, 1587, ordering provincial officials to refrain from converting any more Christian churches to mosques.³⁶

The Hagia Sophia became the first and foremost Friday mosque of Constantinople and would inspire the other great mosques of Ottoman Constantinople, such as the Şehzade and Süleymaniye.³⁷ Over the centuries, changes were made to the building: minarets, a minbar, and a mihrab were added; Christian mosaics were covered; the icons, bells, and crosses removed; and the outer walls were buttressed to better support the centuries-old building.³⁸ But even these changes did not completely alter the nature of the building. Some mosaics and frescoes were left uncovered for nearly two centuries, such as a mosaic of Mary, the mother of Christ, and frescoes of the seraphim on the pendentives, both of which were considered consistent with the Quran.³⁹ Mosaics outside of the main prayer space were also left largely untouched.⁴⁰ It was only in the mid-eighteenth century that all but the seraphim were covered with whitewash.⁴¹ The more liberal sultan Abdülmecid I (r. 1839–1856) wanted to uncover the mosaics when they were discovered during major renovations of the mosque by the Swiss Fossati brothers between 1847 and 1849, but the religious conservatives prevented such a change, instead having eight calligraphic roundels installed, inscribed with the names of Allah, Muhammad, the four Rashidun caliphs, and Muhammad's two grandsons, to maintain a more prominent image of Islam in the mosque.⁴²

Once the Ottoman Empire lost to the Entente in World War I, however, the future of Constantinople would be very different. The city was occupied by Entente forces from 1918 to 1923.⁴³ Mustafa Kemal, later known as Atatürk, would ultimately lead his Turkish nationalist forces to victory, ending the Ottoman Empire, establishing the modern country of Turkey, and securing its international recognition in the Treaty of Lausanne in 1923.⁴⁴ But in this new Turkey, Atatürk made the capital Ankara rather than Istanbul (the official

35. *Id.* at 97, 99.

36. *Id.* at 99.

37. Gülru Necipoğlu, *Challenging the Past: Sinan and the Competitive Discourse of Early Modern Islamic Architecture*, 10 MUQARNAS 169, 171 (1993).

38. Necipoğlu, *supra* note 16, at 202–13.

39. *Id.* at 218–19.

40. *Id.*

41. *Id.* at 221.

42. *Id.* at 221–23.

43. See generally NUR BILGE CRISS, *ISTANBUL UNDER ALLIED OCCUPATION 1918–1923* (1999).

44. Bülent Tanör, *The Birth of a Modern Nation Amidst the Ruins of the Ottoman Empire*, UNESCO Courier 4, 4–6 (Nov. 1981).

modern Turkish name for Constantinople).⁴⁵ For the first time since the fourth century, it was no longer a capital city.

Atatürk, as the first president of Turkey, embarked on an ambitious program of secularization. He established a Western-style constitution, dissolved the Sharia courts, instituted secular education, and mandated the adoption of a Latinized phonetic alphabet.⁴⁶ In 1934, Atatürk's Cabinet decreed that the Hagia Sophia would be a museum.⁴⁷ It opened to tourists in 1935⁴⁸ and remained a museum for nearly a century until recent events in Turkey re-converted it to a mosque.

II. THE 2020 RE-CONVERSION OF THE HAGIA SOPHIA

Turkey mostly followed in Atatürk's secularist legacy until the twenty-first century. In 2003, Recep Tayyip Erdoğan became prime minister of Turkey, and has effectively held the reins of power ever since, first as prime minister until 2014, and then as president from 2014 to today.⁴⁹ Erdoğan's political party, the Justice and Development Party (AKP), has Islamist roots, but initially Erdoğan appeared to be maintaining Turkey's secularist traditions, even attempting to move closer to the European Union during his early years as prime minister.⁵⁰ Yet from 2011 onwards, Islamist rhetoric has moved to the forefront of the AKP.⁵¹ Indeed, Islam has become a primary tool of the AKP to achieve their political objectives.⁵² The AKP has promoted Sunni Muslim ideals as central to Turkish identity and glorified Turkey's Ottoman past.⁵³ The Turkish education system was purged of philosophy and secular thought courses and replaced with theology and history.⁵⁴ At the same time, Erdoğan has filled his rhetoric with anti-Western sentiments and policies.⁵⁵ These practices have energized his religiously conservative base.⁵⁶

Part of Erdoğan's evolving strategy of appealing to his staunchly Muslim base has extended to the re-conversion of museums into mosques. Like their

45. *Id.* at 5.

46. *Id.* at 6–8.

47. Kennedy & Kenyon, *supra* note 2.

48. *Turkish Court Rules 1934 Conversion of Hagia Sophia into Museum Illegal*, TRT WORLD (July 10, 2020), <https://www.trtworld.com/turkey/turkish-court-rules-1934-conversion-of-hagia-sophia-into-museum-illegal-38028>.

49. For a comprehensive summary of how Erdoğan came to power and has maintained it, see Soner Cagaptay, *The New Sultan: Erdogan and the Crisis of Modern Turkey* 90–126 (2017).

50. See Asli Aydintasbas, *Erdogan the Nationalist vs Erdogan the Islamist*, HOOPER INST. (Dec. 13, 2018), <https://www.hoover.org/research/erdogan-nationalist-vs-erdogan-islamist>.

51. *See id.*

52. Ihsan Yilmaz & Galib Bashirov, *The AKP After 15 Years: Emergence of Erdoganism in Turkey*, 39 *THIRD WORLD Q.* 1812, 1822 (2018).

53. *Id.*

54. *Id.* at 1822–23.

55. *Id.* at 1823.

56. *Id.* at 1819.

more famous namesake in Istanbul, the Hagia Sophias in Iznik and Trabzon had been important churches in the Byzantine world, but they were converted into mosques by the Ottomans following the conquests of those cities in 1331 and 1461, respectively.⁵⁷ Also like the Hagia Sophia in Istanbul, they had been changed into museums under the Turkish Republic.⁵⁸ In 2011, the Turkish government converted the Hagia Sophia in Iznik (ancient and medieval Nicaea) into a mosque.⁵⁹ In 2013, the government re-converted the Hagia Sophia in Trabzon (historically known as Trebizond) into a mosque.⁶⁰ In November 2019, the top Turkish administrative court, the Council of State (Danıştay), ruled that the Chora (Kariye) Church in Istanbul could no longer be a museum, which it had been since 1934, as this was against the Ottoman dedication of the building as a mosque following the conquest of Constantinople.⁶¹

The rising tide of conversions into mosques culminated in the summer of 2020 with the conversion of Turkey's greatest former church, the Hagia Sophia in Istanbul, back into a mosque. This conversion had been suggested for years, with a Muslim cleric reading the Quran aloud inside the Hagia Sophia in 2015 and the call to prayer being recited inside the building in 2016.⁶² Throughout 2019 and 2020, Erdoğan more forcefully suggested that the Hagia Sophia might become a mosque once again.⁶³ The ruling by the Council of State in 2019 against the museum status of the Chora Church set a potent precedent for the Hagia Sophia. On July 10, 2020, the Council of State published its decision, again finding in favor of using the building as a mosque.⁶⁴ They con-

57. *Id.*; *Turkey's President Is Playing Religious Politics*, ECONOMIST (July 11, 2020), <https://www.economist.com/europe/2020/07/11/turkeys-president-is-playing-religious-politics>.

58. Caroline Eden, *Turkey's Other Hagia Sophia, in Trabzon*, GUARDIAN (Oct. 25, 2017, 7:09 AM), <https://www.theguardian.com/travel/2017/oct/25/turkey-other-hagia-sophia-trabzon-church-mosque>; Kerry Kolasa-Sikiaridi, *Hagia Sophia in Iznik: Historical Church Turned Mosque*, GREEK REP. (June 14, 2018), <https://eu.greekreporter.com/2018/06/14/hagia-sophia-in-iznik-historical-church-turned-mosque>.

59. Susanne Gusten, *The Church that Politics Turned into a Mosque*, N.Y. TIMES (Feb. 8, 2012), <https://www.nytimes.com/2012/02/09/world/middleeast/the-church-that-politics-turned-into-a-mosque.html>.

60. *Id.*

61. Merih Danalı Cantarella & Anthony Cutler, *The Kariye Museum in Istanbul – A Byzantine Masterpiece Under Threat*, APOLLO MAGAZINE (Jan. 7, 2020), <https://www.apollo-magazine.com/kariye-museum-istanbul-byzantine-cultural-heritage>. The Chora Church was officially reconsecrated as a mosque by presidential decree on August 21, 2020; *see also Presidential Decree Issued to Turn Chora Church into Mosque*, EKATHIMERINI (Aug. 21, 2020, 9:00 AM), <https://www.ekathimerini.com/256080/article/ekathimerini/news/presidential-decree-issued-to-turn-chora-church-into-mosque>.

62. *Hagia Sophia Might Be Reverted to a Mosque, Erdoğan Says*, DAILY SABAH (Mar. 24, 2019, 10:50 PM), <https://www.dailysabah.com/politics/2019/03/24/hagia-sophia-might-be-reverted-to-a-mosque-erdogan-says>.

63. *Id.*

64. Danıştay, Esas No. 2016/16015, Karar No. 2020/2595 (2020) [Council of State Journal, 2020].

cluded that the original endowment deed for the Hagia Sophia, granted by Sultan Mehmed II, had made it a mosque, therefore the 1934 Cabinet decision turning it into a museum was illegal.⁶⁵ Minutes later, Erdoğan issued a presidential decree declaring the building a mosque once more.⁶⁶ Two weeks later, on July 24, 2020, the Hagia Sophia officially opened for Friday prayers for the first time since the days of Atatürk.⁶⁷

While the conversions of the Hagia Sophias in Iznik and Trabzon and the ruling on the Chora Church were received with outrage from some interested groups, including the Greek Orthodox community, the conversions failed to capture global attention.⁶⁸ In comparison, the conversion of the Hagia Sophia in Istanbul captivated and shocked people from around the world. The U.S. Department of State officially remarked that it was “disappointed” by Turkey’s actions.⁶⁹ Then U.S. Democrat presidential nominee, now President, Joe Biden urged Erdoğan to reverse his decision.⁷⁰ Greece categorically condemned the conversion “in the most intense manner.”⁷¹ The twenty-seven foreign ministers of the European Union also condemned the decision.⁷² The United Nations Educational, Scientific and Cultural Organization (UNESCO) released an official statement that expressed their profound disappointment with Turkey’s

65. Dilara Aslan, *Istanbul’s Hagia Sophia Reopens to Worship as Mosque After Top Administrative Court Repeals 1934 Decree*, DAILY SABAH (July 10, 2020, 3:43 PM), <https://www.dailysabah.com/politics/istanbuls-hagia-sophia-reopens-to-worship-as-mosque-after-top-administrative-court-repeals-1934-decree/news>.

66. Carlotta Gott, *Erdogan Signs Decree Allowing Hagia Sophia to Be Used as a Mosque Again*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/world/europe/hagia-sophia-erdogan.html>.

67. Erin Cunningham, Kareem Fahim, & Adam Taylor, *First Prayers Held at Hagia Sophia After Turkey Converts It from Museum to Mosque*, WASH. POST (July 24, 2020, 1:38 PM), https://www.washingtonpost.com/world/middle_east/first-prayers-to-be-held-at-hagia-sophia-after-turkey-converts-it-from-museum-to-mosque/2020/07/23/0b8bf81e-ccf8-11ea-99b0-8426e26d203b_story.html.

68. See, e.g., Amberin Zaman, *Another Byzantine Church Becomes Mosque in Turkey*, AL-MONITOR (Aug. 7, 2013), <https://www.al-monitor.com/pulse/originals/2013/08/another-byzantine-church-becomes-a-mosque.html>; *AHI Condemns Turkish Administrative Court’s Ruling that Denigrates Christian History*, AM. HELLENIC INST. (Feb. 11, 2020), <https://www.aheworld.org/press-releases-1/2020/2/7/ahi-condemns-turkish-administrative-courts-ruling-that-denigrates-christian-history>.

69. Tal Axelrod, *State Dept. Says US ‘Disappointed’ by Turkey’s Move to Turn Hagia Sophia Back into Mosque*, HILL (July 10, 2020, 8:08 PM), <https://thehill.com/homenews/administration/506857-state-dept-says-us-disappointed-by-turkeys-move-to-turn-hagia-sophia>.

70. Tasos Kokkinidis, *Joe Biden Urges Erdogan to Reverse Decision on Hagia Sophia*, GREEK REP. (July 11, 2020), <https://usa.greekreporter.com/2020/07/11/joe-biden-urges-erdogan-to-reverse-decision-on-hagia-sophia>.

71. *Greece Condemns Turkey’s Decision to Convert Hagia Sophia into Mosque*, REUTERS (July 10, 2020, 3:40 PM), <https://www.reuters.com/article/us-turkey-museum-verdict-greece/greece-condemns-turkeys-decision-to-convert-hagia-sophia-into-mosque-idUSKBN-24b2UF>.

72. *EU Ministers Chide Turkey Over Hagia Sophia*, DW (July 13, 2020), <https://www.dw.com/en/turkey-hagia-sophia-european-union/a-54165074>.

actions.⁷³ Christians from around the world even united for a global “day of mourning” for the Hagia Sophia on July 24, 2020, the same day the mosque opened for prayers.⁷⁴

Many of these criticisms described the act as a violation of law.⁷⁵ Yet laws do not exist as broad principles that merely fall from the sky, and there is a question as to whether a legal basis existed for the re-conversion. The following parts will address first how Turkish domestic law considers the conversion of the Hagia Sophia, then how international law constrains Turkey’s actions in this case.

III. THE RE-CONVERSION UNDER TURKISH LAW

The legality of the re-conversion of the Hagia Sophia under Turkish law turns on two principles: the law of waqf (Islamic charitable trusts) and the constitutional separation of religion from state actions. First, the former would appear to support the re-conversion of the Hagia Sophia, as Mehmed II set the Hagia Sophia aside as a mosque. Yet the requirements and history for a valid waqf make this more questionable. In addition, the overriding religious purpose of the re-conversion also makes it quite questionable under the principle of strict secularism enshrined in the Turkish Constitution.

A. *The Council of State Ruling, Waqf, and the Protection of Churches Under Islam*

The case before the Council of State revolved around the purpose for which the Hagia Sophia waqf (or vakif in Turkish), an Islamic endowment or charitable trust,⁷⁶ was established by Mehmed II in 1470.⁷⁷ Under Turkish law, waqfs established under Islamic law prior to the establishment of Turkey’s secular Civil Code remain in force and continue to be interpreted under Islamic law.⁷⁸ The Council of State found that the Hagia Sophia was a mosque under

73. UNESCO Statement on Hagia Sophia, Istanbul, supra note 7.

74. Emily Judd, *Hagia Sophia ‘Day of Mourning’ Unites Christians Against Erdogan Decision*, AL ARABIYA NEWS (July 23, 2020, 9:02 PM), <https://english.alarabiya.net/en/features/2020/07/23/Hagia-Sophia-Day-of-Mourning-unites-Christians-against-Erdogan-decision>.

75. See, e.g., Nora Koloyan-Keuhnlian, *Erdogan’s Revenge Over Lausanne*, AHRAM ONLINE (July 14, 2020), <http://english.ahram.org.eg/NewsPrint/374488.aspx>; Vlachopoulos, supra note 9; *Greek PM: Hagia Sophia Issue Is Indicative of How Turkey Approaches International Agreements*, ORTHODOX TIMES (July 18, 2020, 5:45 PM), <https://orthodoxtimes.com/greek-pm-hagia-sophia-issue-is-indicative-of-how-turkey-approaches-international-agreements>.

76. Under Islamic law, the waqf is an endowment for a religious or social cause. It can hold assets to satisfy the waqfiyya, or founding deed, which can specify any lawful service or social function. See Timur Kuran, *The Absence of the Corporation in Islamic: Origins and Persistence*, 53 AM. J. COMP. L. 785, 799 (2005).

77. Danıştay, Esas No. 2016/16015, Karar No. 2020/2595 (2020) [Council of State Journal, 2020].

78. *Id.*

Mehmed II's waqf, and its status could not be changed by an administrative decision from Atatürk's Cabinet.⁷⁹ They therefore struck down the Cabinet decision of 1934 that had made the Hagia Sophia a museum.⁸⁰

This case is an unusual one in that it combines both modern Turkish and Ottoman Islamic law. Under blackletter law alone, it would appear that this decision is correct. The waqf structure of the Hagia Sophia was maintained in the Waqf Law of 1935 (No. 2762), the 2001 Law on the Application and Enforcement of the Turkish Civil Code (No. 4722), and the Waqf Law of 2008 (No. 5737).⁸¹ Furthermore, in a 1969 decision, Turkey's Constitutional Court held that the property of a waqf belonged to the waqf itself, never the State.⁸² As far as applicable law, Law No. 4722 stated that the law at the time of writing the waqf charter would be applicable.⁸³ The official Turkish state opinion was that under Ottoman law at the time, the Hagia Sophia was the personal property of Mehmed II, not the State.⁸⁴ Mehmed had conquered the Byzantine Empire, and therefore the Byzantine emperor's possessions became his.⁸⁵ Mehmed II's intention was to assign the Hagia Sophia to the public to be used as a mosque.⁸⁶ The intent of the grantor must be honored.⁸⁷ By making the endowment a personal one rather than a governmental one, Erdoğan's government effectively countered the argument that Atatürk had the authority to turn the Hagia Sophia into a mosque in 1934.

But, as Professor Moataz Al-Khatib has articulated, the nature of the endowment is actually more questionable than this straightforward analysis would suggest.⁸⁸ Taking conquered lands, under Islamic law, would likely be in the sultan's governmental capacity rather than as an individual, and disposing

79. *Id.*

80. *Id.*

81. *Id.*

82. Anayasa Mahkemesi, Esas No. 1967/47, Karar No. 1969/9 (1969) [Constitutional Court of Turkey, 1969].

83. Law on the Application and Enforcement of the Turkish Civil Code, Law No. 4722, Resmi Gazete [R.G.] 22 Nov., 2001, No. 24607 (Turk.) (stating that “[t]he law applicable at the time shall be applied to the legal consequences of events that have preceded the entry into force of the Turkish Civil Code”).

84. سلطاني؟ أم شخصي وقف صوفيا آیا هل الخطيب معتز, AL JAZEERA (July 22, 2020), <https://www.aljazeera.net/opinions/2020/7/22/%D9%87%D9%84-%D8%A2%D9%8A%D8%A7-%D8%B5%D9%88%D9%81%D9%8A%D8%A7-%D9%88%D9%82%D9%81-%D8%B4%D8%AE%D8%B5%D9%8A%D9%91-%D8%A3%D9%85-%D8%B3%D9%84%D8%B7%D8%A7%D9%86%D9%8A%D9%91%D8%9F>.

85. *Id.*

86. Danıştay, Esas No. 2016/16015, Karar No. 2020/2595 (2020) [Council of State Journal, 2020].

87. الخطيب, *supra* note 84. This is also true of donative transfers under U.S. law. Restatement (Third) of Property: Wills and Other Donative Transfers § 10.1 (2003) (stating that the “donor’s intention is given effect to the maximum extent allowed by law”).

88. الخطيب, *supra* note 84.

of open lands was also typically a governmental rather than a personal role.⁸⁹ Waqfs by the government containing public property are “earmark waqfs” (waqf irşādī), and future rulers are also able to revise or even contradict the terms of earmark waqfs.⁹⁰

Some commentators stated that Mehmed II had purchased the Hagia Sophia with his own funds first, but there is no documentary evidence of such an act, and it is indeed contradicted by the proposition that Mehmed II inherited lands directly from his imperial Byzantine predecessors.⁹¹ Turkish Foreign Minister Mevlüt Cavuşoğlu, a central member of the AKP, contradicted Erdoğan’s stance by referring to the Hagia Sophia as property of the Ottoman Empire and Mehmed II as a proxy for Muslim Ottoman citizens, rather than a personal endower.⁹² Indeed, even Islamic judicial traditions differ, but ultimately place the onus on the sultan as a governmental entity rather than an individual; the Maliki tradition, for example, holds that conquered land is immediately deposited in the hands of Muslims as a whole, while the Hanafi tradition, which the Ottomans primarily followed, defers to the judgment of the sultan, who either appropriates the land for Muslim citizens or allows the original owners to keep it.⁹³

The actual endowment deed contains not just the Hagia Sophia, but a wide variety of endowments, including schools, markets, homes, farms, mills, and other structures and land; the large amount of property being endowed suggests that this was the act of a governmental authority divvying up conquered territory, not an individual bequest.⁹⁴ An additional problem is that the endowment deed is missing an exact date and was likely drafted around 1462, when the endowments of Mehmed II were compiled.⁹⁵ This nine-year delay in recordation after the conquest undermines the argument that the endowment was part of an act of conquest in the first place, making it more likely that the Hagia Sophia had first become state property, and was only later turned into a mosque.⁹⁶

If the Hagia Sophia waqf was created by the government, and not Mehmed II as an individual, the successor Turkish state government of Atatürk had authority over the endowment. There is limited Hanafi jurisprudence that even an earmark waqf cannot be completely repurposed, just modified.⁹⁷ However, the line between modifying and repurposing is ill-defined,⁹⁸ providing a

89. *Id.*; see also *The Hagia Sophia Case*, *supra* note 11, at 1283. (“[T]he Hagia Sophia could not have become Mehmed’s property after the conquest.”).

90. *The Hagia Sophia Case*, *supra* note 11, at 1284.

91. الخطيب, *supra* note 84.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *The Hagia Sophia Case*, *supra* note 11, at 1285.

98. *Id.*

less than ironclad justification for the re-conversion of the Hagia Sophia. At the very least, the Council of State needed to address these apparent contradictions and Hanafi precedent to render a fully informed decision.

Another problematic angle is that while the purpose of the waqf is supposed to be unchangeable, history has created a very different precedent. While the decision was upheld on the basis of the waqf, Mehmed II, that same grantor of the waqf of the Hagia Sophia, also confiscated more than a thousand waqfs during his reign.⁹⁹ As Harvard Professor of Turkish Studies Cemal Kafadar has argued, the exact same waqfs have been treated differently over time depending on the prevailing political and social climate, which substantially weakens the precedent of waqf inviolability, especially under Mehmed II.¹⁰⁰ The fact that Mehmed II repeatedly violated the waqf institution only underlines this weakness.¹⁰¹ So the waqf argument, even though rooted in Islamic law, is not ironclad.

Even if the waqf must maintain its originally intended form in perpetuity, the formation of the waqf in the Hagia Sophia is also potentially questionable. A basic requirement of the waqf is that it is established for a purpose that is lawful under Islamic law.¹⁰² Turkish scholars have argued that because Mehmed II conquered Constantinople, he was within his legal rights to convert the Hagia Sophia.¹⁰³ For example, Ankara University Professor Omair Anas concluded that it was not technically unlawful for the Ottoman sultan to convert the Hagia Sophia into a mosque.¹⁰⁴ He also argued that Islamic jurisprudence holds, “once a mosque, always a mosque.”¹⁰⁵

But arguments such as Professor Anas’ ignore the basic requirement of a waqf to be for a lawful purpose. Forcibly taking a church and turning it into

99. Yasir Yılmaz, *Is the Conversion of Hagia Sophia into a Mosque an Islamic Act?*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFF. (July 27, 2020), <https://berkeleycenter.georgetown.edu/responses/is-the-conversion-of-hagia-sophia-into-a-mosque-an-islamic-act>.

100. Serkan Ayvazoğlu, “Ayasofya’nın bir gayya kuyusuna dönüşme tehlikesi var”, MAGMA (July 24, 2020), https://www.magmadergisi.com/yasam-haberleri/ayasofyan-in-bir-gayya-kuyusuna-donusme-tehlikesi-var?fbclid=IwAR03a9rc7pOLywJE6iR7cvpMx-0LSzcc9czT5wR2YspOm_ZnihZ6CzQMtj24.

101. *Id.*

102. Timur Kuran, *Legal Roots of Authoritarian Rule in the Middle East: Civic Legacies of the Islamic Waqf*, 64 AM. J. COMP. L. 419, 422–23 (2016).

103. See, e.g., Syed Khaliq Ahmed, “Erdogan Is Legally Correct to Restore Hagia Sophia Into a Mosque”: Turkish University Professor Dr. Omair Anas, INDIA TOMORROW (July 20, 2020, 6:07 PM), <http://www.indiatomorrow.net/eng/it-is-legally-correct-to-convert-hagia-sophia-into-a-mosque-but-sharing-it-with-christians-will-unite-world-communities-turkish-university-professor-dr-omair-anas>; Motasem A. Dalloul, *The Court Ruling Has Overturned a Historic Injustice; Hagia Sophia Was Already a Mosque*, MIDDLE E. MONITOR (July 13, 2020, 9:23 AM), <https://www.middleeastmonitor.com/20200713-the-court-ruling-has-overturned-a-historic-injustice-hagia-sophia-was-already-a-mosque> (explaining how Salim Agdoghan said that the conquered land became the personal property of Mehmed II).

104. *Id.*

105. Ahmed, *supra* note 103.

a mosque is not permitted by the Quran; indeed, many commentators understand that the Quran calls for the protection of churches.¹⁰⁶ One article has instead pointed to Hanafi jurisprudence on conquest; if a city surrenders, property must be protected, whereas forceful conquest permits voiding existing property rights.¹⁰⁷

The conversion of churches to mosques was not uncommon under the various Muslim dynasties of the Middle Ages and even later.¹⁰⁸ The Ottoman Empire, in particular, used this practice as “a sign of Islamic conquest and supremacy.”¹⁰⁹ Yet converting major churches following conquest was not a universal norm in Islam. Indeed, the earliest practices of the Prophet Muhammad and the Rashidun caliphs show remarkable deference to Christian churches, especially for a time when the conversion or destruction of conquered religious sites was practically a universal norm. The example of Caliph Umar (r. 634–644) is notable, as he specifically avoided praying at the Church of the Nativity in Bethlehem and prohibited Muslim prayers from taking place there to preserve it for the Christians.¹¹⁰ He similarly spared Christian churches after taking Jerusalem in 637.¹¹¹

Even from a theological perspective, Islam has always recognized Christianity and Judaism, which means the conversion of mosques into churches takes on a very different meaning from the conversion of churches into mosques.¹¹² Indeed, the only mention of churches in the Quran refers to “monasteries, churches, synagogues, and mosques in which the name of God is much mentioned,” respectfully referring to all these houses of worship.¹¹³

106. See Quran 22:40 (“For had it not been for Allah’s repelling some men by means of others, monasteries and churches and synagogues and mosques, wherein the name of Allah is oft mentioned, would assuredly have been pulled down. Verily Allah helps one who helps Him”). However, Surat Al-Hajj 22:40 is open to interpretation, and others have found that it does not necessarily prohibit the conversion of some Christian and Jewish places of worship into mosques. For a variety of interpretations of Surat Al-Hajj 22:40, see Abu Amina Elias, *Protection of Non-Muslim Houses of Worship in Islam*, FAITH IN ALLAH (Oct. 18, 2015), <https://www.abuaminaelias.com/protection-of-non-muslim-houses-of-worship-in-islam>.

107. See, e.g., *A History of Conquests: Churches Becoming Mosques*, RASEEF22 (Aug. 28, 2019, 7:01 PM), <https://raseef22.com/article/1074927-a-history-of-conquests-churches-becoming-mosques>.

108. See, e.g., *A History of Conquests: Churches Becoming Mosques*, RASEEF22 (Aug. 28, 2019, 7:01 PM), <https://raseef22.com/article/1074927-a-history-of-conquests-churches-becoming-mosques>.

109. See Will Maule, *Turkish Authorities Approve Conversion of Historic Church into Mosque*, CBN NEWS (Nov. 22, 2019), <https://www1.cbn.com/cbnnews/cwn/2019/november/turkish-authorities-approve-conversion-of-historic-church-into-mosque> (quoting Dr. Vassilios Meichanetsidis).

110. Yilmaz, *supra* note 99.

111. Mustafa Akyol, *Would the Prophet Muhammad Convert the Hagia Sophia?*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/opinion/hagia-sophia-mosque.html>.

112. Yilmaz, *supra* note 99.

113. Quran 22:40.

The normalization of the conquest and conversion of churches came not from the Quran or the example of the Prophet Muhammad, but rather from administrative and political desires.¹¹⁴ The conversions of churches and other religious buildings became based not on the Quran or the Sunna, but independent rulings of later Muslim jurists.¹¹⁵ Some early examples of conversions of churches were even distorted in the histories and public records to support a norm that, in actuality, was less common.¹¹⁶

Contemporary Muslim leaders and scholars have used this historical rationale to argue that the re-conversion of the Hagia Sophia is against the principles of Islam. Mike Ghouse, the founder and president of the Center for Pluralism, argued that Erdoğan's conversion was contrary to the Sunna of Muhammad and emphasized the need for Islam to continue to serve as example of religious tolerance.¹¹⁷ Sayyid Syeed, President of the Islamic Society of North America, stated, "The conversion of the Hagia Sophia was against the historical examples set by the righteous Caliphs, beginning with Abu Bakr when he advised his general heading to conquer foreign lands."¹¹⁸ Saeed concluded, "The Quran 22:40 clearly states that it is against Allah's plan to demolish places of worship and convert them into something else."¹¹⁹ In this same vein, Professor Ridwan Al-Sayyed found that conversions of churches into mosques, ever since the beginning of Islam, were not religious acts, but political ones motivated by the desires of caliphs and sultans; he concluded that the re-conversion of the Hagia Sophia was similarly an act of political advantage by Erdoğan.¹²⁰

114. See Necmeddin Güney, *Churches and Synagogues in Classical Islamic Law: Debates on Construction, Continuance and Repair*, INTERNATIONAL CONFERENCE ON RELIGIOUS TOURISM AND TOLERANCE: PROCEEDINGS, 353, 359 (Muhsin Kar, ed., May 9–12, 2013).

115. *Id.*

116. See FRED DONNER, *THE EARLY ISLAMIC CONQUESTS* 246–47 (2008).

117. Mark Ghouse, *President Erdogan, Preserve Hagia Sophia as a Church*, RELIGION NEWS SERVICE (July 8, 2020), <https://religionnews.com/2020/07/08/president-erdogan-preserve-hagia-sophia-as-a-church>.

118. Mike Ghose, *Turkey: Hagia Sophia Should Not Be Converted to a Mosque*, COUNTER CURRENTS (July 8, 2020), <https://countercurrents.org/2020/07/turkey-hagia-sophia-should-not-be-converted-to-a-mosque>.

119. Sayyid Syeed, *Islamic View of the Conversion of Hagia Sophia*, NEOS KOSMOS (July 23, 2020, 4:20 PM), <https://neoskosmos.com/en/170766/islamic-view-of-the-conversion-of-hagia-sophia/#:~:text=The%20Quran%2040%3A22%20clearly,of%20worship%20in%20a%20war.>

120. See *أيا صوفيا، واقعة «أيا صوفيا»: «لا دين معتبر... ولا سياسة حكيمة»*, ASHAHQ AL-AWSAT (July 17, 2020), <https://aawsat.com/home/article/2394186/%D8%B1%D8%B6%D9%88%D8%A7%D9%86-%D8%A7%D9%84%D8%B3%D9%8A%D8%AF/%D9%88%D8%A7%D9%82%D8%B9%D8%A9-%C2%AB%D8%A2%D9%8A%D8%A7-%D8%B5%D9%88%D9%81%D9%8A%D8%A7C2%BB-%D9%84%D8%A7-%D8%AF%D9%8A%D9%86-%D9%85%D8%B9%D8%AA%D8%A8%D8%B1-%D9%88%D9%84%D8%A7-%D8%B3%D9%8A%D8%A7%D8%B3%D8%A9-%D8%AD%D9%83%D9%8A%D9%85%D8%A9.>

B. *The Turkish Constitution and Religion*

But even if the Council of State ruled correctly on the grounds of waqf law, it did not address two principles of the Turkish Constitution that cast the conversion in a much more questionable light. These determinations would be for the Constitutional Court (Anayasa Mahkemesi) to make, as that court has the final authority to examine the constitutionality, in both form and substance, of all laws and decrees.¹²¹ First, in the preamble of the Turkish Constitution, it states that “[s]acred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism.”¹²² The Council of State did not address this principle of secularism when making their determination. Second, Article 24 of the Constitution states that “[n]o one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence.”¹²³ The Council of State also did not address this principle of exploiting religion.

These two provisions of the Turkish Constitution have the same overriding restriction: avoid any entanglement with religion. On paper, the case before the Council of State was merely about waqf rights. But the purpose was cloaked in religion and involved excessive entanglement of religious and political goals. There was a clear political and religious motive behind the re-conversion of the Hagia Sophia: the reclamation of a space of religious significance under the guise of conquest.

Despite the focus on secularism over the last century, Turkey never abandoned Islam, and the religion continues to be a significant form of identity in the majority Sunni Muslim nation.¹²⁴ The conversion of the Hagia Sophia to a museum by Atatürk was a deeply emotional experience for Turkish Islamists, who saw it as the final death knell of the Ottoman Empire and the Caliphate.¹²⁵ Most Islamists dreamed of the day the Hagia Sophia would be a mosque again, and Erdoğan, a committed Islamist, was certainly among them.¹²⁶

Analysts have seen Erdoğan’s conversion of the Hagia Sophia as a gambit to maintain political power during a time of significant economic downturn in Turkey.¹²⁷ His political rivals, such as İYİ Party Chair Meral Akşener criticized Erdoğan for creating an “artificial crisis” to divert the Turkish people from more

121. TÜRKİYE CUMHURİYETİ ANAYASASI MADDE 148.

122. *Id.*

123. *Id.* Madde 24.

124. See Bülent Batuman, *Hagia Sophia and Islamist Nation-Building: Hijacking the Conservative Architectural Imaginary*, Berkley Ctr. for Religion, PEACE & WORLD AFF. (July 27, 2020), <https://berkeleycenter.georgetown.edu/responses/hagia-sophia-and-islamist-nation-building-hijacking-the-conservative-architectural-imaginary>.

125. Yılmaz, *supra* note 99.

126. *Id.*

127. Batuman, *supra* note 124.

pressing issues.¹²⁸ Erdoğan's base of supporters have always been conservative devout Muslims, and he has increasingly used populist Islamist discourse to bind his supporters to him, especially after the attempted coup against him in 2016.¹²⁹ Erdoğan's government has given the Directorate of Religious Affairs (Diyanet İşleri Başkanlığı)¹³⁰ significant influence, including control of over 85,000 mosques and the Islamic imam-hatip schools, which conduct secondary schooling for 14 percent of Turkish children.¹³¹ The focus of Erdoğan's rhetoric leading up to the conversion was not couched in the rights of waqfs, but in religious terms: the right to allow prayers and the recitation of surahs in the Hagia Sophia.¹³² The Turkish government even countered foreign criticism of the conversion by referring to the presence—or rather the lack thereof—of mosques in those countries, placing a further emphasis on the religious purpose of the conversion.¹³³

In addition to religious rhetoric, the conversion of the Hagia Sophia was also wrapped up in the message of conquest. Erdoğan announced to the Turkish people that his conversion of the Hagia Sophia back into a mosque would please “the spirit of conquest” of Mehmed II and that the Turkish-Muslim conquest “which has been going on for 567 years, has entered a new phase.”¹³⁴ This conquest rhetoric and the “right of the sword” (kılıç hakkı) has permeated official statements from the Erdoğan government.¹³⁵ Erdoğan's coalition partner, Devlet Bahçeli, has argued that the right to convert the Hagia Sophia is the

128. *Row over Hagia Sophia an Artificial Crisis*: Akşener, HÜRRIYET DAILY NEWS (June 10, 2020, 12:33 AM), <https://www.hurriyetdailynews.com/row-over-hagia-sophia-an-artificial-crisis-aksener-155525>.

129. Ahmet Kuru, *Hagia Sophia, Islamism, and Secularism in Turkey*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFF. (July 17, 2020), <https://berkeleycenter.georgetown.edu/responses/hagia-sophia-islamism-and-secularism-in-turkey>.

130. The Directorate of Religious Affairs was established shortly after the creation of modern Turkey and was meant to replace the Ottoman era Sheikh ul-islam, the leading Sunni religious authority in the Ottoman Empire behind the Ottoman sultan. The Directorate was meant to regulate religious education and the Constitution required it to “exercise its duties . . . in accordance with the principles of secularism.” TÜRKİYE CUMHURİYETİ ANAYASASI MADDE 136. However, under AKP leadership, the Directorate's power and influence have grown considerably. See *Turkey's Religious Affairs Directorate Has Become a Tool for Silencing Dissent*, STOCKHOLM CTR. FREEDOM (Mar. 26, 2021), <https://stockholmcf.org/turkeys-religious-affairs-directorate-has-become-a-tool-for-silencing-dissent>.

131. *Id.*

132. See, e.g., *Gov't May Look to Change Hagia Sophia's Status*, HÜRRIYET DAILY NEWS (June 5, 2020, 1:50 PM), <https://www.hurriyetdailynews.com/govt-may-look-to-change-hagia-sophias-status-155376>.

133. Erdoğan Says 'Not a Single Mosque Left in Athens', HÜRRIYET DAILY NEWS (June 1, 2020, 9:54 AM), <https://www.hurriyetdailynews.com/erdogan-says-not-a-single-mosque-left-in-athens-155227>.

134. Aykan Erdemir & Tugba Tanyeri-Erdemir, *Turkish Government's Hagia Sophia Rhetoric Adds Insult to Injury*, PROVIDENCE (July 24, 2020), <https://providencemag.com/2020/07/turkish-government-hagia-sophia-rhetoric-adds-insult-injury>.

135. *Id.*

right of a conqueror, while deriding critics as the “remnants of the Byzantines.”¹³⁶ When the first Friday prayers occurred on July 24, 2020, Ali Erba, the chief of the Directorate of Religious Affairs, appeared on the pulpit with sword in hand.¹³⁷ The connected messages of religion and conquest only further clarifies the religious purpose of the conversion of the Hagia Sophia.

Thus, we return to whether the conversion of the Hagia Sophia violates the separation of religion from secular authority in the Turkish Constitution. It likely does. Even if the decision by the Council of State was based on law surrounding waqfs, the purpose of the conversion is plainly different. Such excessive entanglement between Islam and Erdoğan’s government at the very least runs counter to the spirit of Atatürk’s secularist state, if not the very Constitution itself. Therefore, the legality of the conversion under Turkish law is questionable.

IV. INTERNATIONAL LAW

Erdoğan unequivocally called the status of the Hagia Sophia an internal matter for Turkey, denouncing criticisms about the conversion as attacks on Turkish sovereignty.¹³⁸ He argued that the Hagia Sophia’s status, whether as a museum or a mosque, was within Turkey’s sovereign rights.¹³⁹ He is partially correct. The territory of a sovereign country is fully within that country’s political and legal jurisdiction; however, that sovereignty can be limited by international agreements to which that country has adhered. The Turkish Constitution expressly establishes that international agreements have the force of law in Turkey.¹⁴⁰ The potential restrictions on unhindered Turkish authority over the Hagia Sophia are particularly salient in relation to treaties on the European Court of Human Rights, cultural heritage, freedom of religion, cultural rights, minority rights, and conquest.

A. *European Court of Human Rights*

Turkey is subject to the jurisdiction of the European Court of Human Rights (ECtHR). Turkey signed the underlying Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) in 1950, ratified it in 1954, accepted individual petitions to the ECtHR in 1987, and acknowledged the ECtHR’s jurisdiction in 1990.¹⁴¹ Under

136. *Id.*

137. Yılmaz, *supra* note 99.

138. Anadolu Agency, *Accusations About Hagia Sophia Directly Target Turkey’s Sovereignty*, Erdoğan Says, DAILY SABAH (July 3, 2020, 5:47 PM), <https://www.dailysabah.com/politics/accusations-about-hagia-sophia-directly-target-turkeys-sovereignty-erdogan-says/news>.

139. *Erdogan Rejects Global Criticism Over Hagia Sophia Decision*, AL JAZEERA (July 11, 2020), <https://www.aljazeera.com/features/2020/7/11/erdogan-rejects-global-criticism-over-hagia-sophia-decision>.

140. Türkiye Cumhuriyeti Anayasası Madde 90.

141. Council of Europe portal: Chart of signatures and ratifications of treaty 005, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures> (status

the European Convention on Human Rights, all signatories must secure the rights enshrined in Section I of the Convention (basic civil, political, cultural, and economic rights) for everyone inside their jurisdiction.¹⁴² Furthermore, state parties are bound by the decisions of the ECtHR.¹⁴³

As a preliminary issue, the ECtHR has recognized the institution of the waqf. In the Hagia Sophia case, the Turkish Council of State cited ECtHR case law that held that the trust privileges of waqfs, including waqfs founded during the Ottoman period, were guaranteed under rule of law.¹⁴⁴ Therefore, there is no inconsistency between upholding a waqf's validity and the European Convention on Human Rights.

The decision to re-convert the Hagia Sophia, however, might still fall afoul of the European Convention on Human Rights. Freedom of religion would appear to be one of the more promising grounds for collateral attack against the Hagia Sophia's re-conversion. Article 9 of the European Convention on Human Rights provides for freedom to manifest one's religion or beliefs, with only such limitations as are "prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."¹⁴⁵ ECtHR cases have so far not addressed the issue of the conversion of religious buildings, but the re-conversion is unlikely to violate Article 9. The conversion of an active religious building might very well violate of Article 9, but the Hagia Sophia is a different case as it was a museum immediately before the conversion, not a church. Had the 1453 conversion of the Hagia Sophia from a church to a mosque happened today, it might have violated Article 9 as a restriction on a religious community, but that is not this situation.

An alternative model suggested by Greek law professor Spyros Vlachopoulos suggests instead utilizing Article 8, which protects private life, including the protection of the environment, and Article 2 of Additional Protocol 1 of the European Convention on Human Rights, which protects the right to education.¹⁴⁶ Vlachopoulos suggests broad readings of these two articles to protect freedom of access to cultural heritage sites and the preservation of sites of historical importance.¹⁴⁷ But this reading is undermined by the 2019 ECtHR decision in *Ahunbay v. Turkey*. In *Ahunbay*, the ECtHR held that there was no evidence to support a universal individual right to the protection of cultural

as of Aug. 19, 2020).

142. Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, Eur. T.S. No. 5.

143. *Id.* art. 46.

144. *Danıştay*, Esas No. 2016/16015, Karar No. 2020/2595 (2020) [Council of State Journal, 2020] (citing Board of Directors of the Waqf of Samatya Surp Kevork Armenian Church, School and Graveyard v. Turkey, No. 1480/03, Eur. H.R. (2008)).

145. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 142, art. 9.

146. Vlachopoulos, *supra* note 9.

147. *Id.*

heritage, finding that so far this right only applied to minorities enjoying their own cultural heritage.¹⁴⁸ But the ECtHR wrote its decision in such a way that suggests that this norm could change, stressing that this is the “current state” of international law.¹⁴⁹ Therefore, this model is, at present, an unworkable one for restricting the conversion of the Hagia Sophia. However, it provides a potential avenue for expanding protections for sites like it, a notion we shall return to in Part V.¹⁵⁰

B. *Cultural Heritage*

The primary international treaty on the protection of cultural heritage inside a country is the Convention Concerning the Protection of the World Cultural and Natural Heritage (“World Heritage Convention”). The World Heritage Convention protects cultural heritage, defined as monuments, groups of buildings, and sites which are of outstanding universal value from the point of view of history, art, science, ethnography, or anthropology.¹⁵¹ Turkey ratified the World Heritage Convention in 1983.¹⁵² Under the World Heritage Convention, each state party must identify and delineate its own cultural heritage.¹⁵³ The Hagia Sophia was admitted to the World Heritage List in 1985 as part of the “historic areas of Istanbul.”¹⁵⁴ Therefore, the Hagia Sophia is cultural heritage under the World Heritage Convention.

When the Hagia Sophia was turned into a mosque, the UNESCO—which sets the agendas of the World Heritage Committee that establishes and maintains a list of world heritage sites and provides assistance for their maintenance pursuant to the World Heritage Convention¹⁵⁵—was deeply disappointed, calling on Turkey to “abide by its legal commitments and obligations.”¹⁵⁶ In particular, UNESCO argued that “a State must ensure that no modification is made to the outstanding universal value of the property inscribed on its territory.”¹⁵⁷ But the World Heritage Convention does not explicitly state any such requirement. The main requirements of the World Heritage Convention

148. *Ahunbay and Others v. Turkey*, App. No. 6080/06, Eur. Ct. H.R. 23–24 (2019).

149. *Id.* at ¶ 24.

150. *See infra* V.

151. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage art. 1, Nov. 16, 1972, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention]. The World Heritage Convention also protects natural heritage, but this is beyond the scope of this article. *Id.* art. 2.

152. *States Parties Ratification Status*, UNESCO World Heritage Convention <http://whc.unesco.org/en/statesparties> (last updated Oct. 23, 2020).

153. *Id.* art. 3.

154. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Ninth Ordinary Session, Dec. 2–6, 1985, SC-85/CONF.008/9, 11.

155. World Heritage Convention, *supra* note 151, at art. 11, 13–14.

156. *UNESCO Expresses Deep Regret Over Turkey Decision to Change Status of Historic Hagia Sophia*, UN NEWS (July 10, 2020), <https://news.un.org/en/story/2020/07/1068151>.

157. *Id.*

are located in Article 5. Article 5 obliges states parties to take “effective and active measures . . . for the protection, conservation and presentation of the cultural and natural heritage situated on its territory.”¹⁵⁸ But this does not concretely state any obligations of the state party, except of course to refrain from harming the site.¹⁵⁹ There is no requirement to refrain from making modifications to cultural heritage sites or to first notify UNESCO of any such changes. In addition, Article 6 also stresses respect for a country’s sovereignty,¹⁶⁰ and sovereignty is the justification Erdoğan used for the conversion, which further weakens UNESCO’s argument.

Instead, whether Article 5 is violated really depends on how the Hagia Sophia is modified in the coming years due to the re-conversion. As mentioned in Part I, the Hagia Sophia’s mosaics were whitewashed for over a century by Ottoman authorities.¹⁶¹ Conservationists and art historians raised concerns about the future of the now uncovered mosaics, which are of substantial historical and cultural value.¹⁶² For now, Turkish authorities have stated that the mosaics will be covered by curtains or electronic lasers only during religious services.¹⁶³ As long as these practices do not damage the mosaics, Turkey’s Article 5 obligations appear to be met.

Another potential violation of Article 5 relates to the conservation of the Hagia Sophia overall. Previously, as a museum, the Hagia Sophia collected entrance fees of 100 liras, which, as the most visited tourist site in Turkey, resulted in a significant source of income for conservation efforts at the 1,500 year-old site.¹⁶⁴ As a mosque, there will be no entrance fees, which removes a major conservation funding source.¹⁶⁵ It will fall to the Turkish government to provide sufficient resources to maintain a similar, or at least adequate, level of conservation; otherwise, Turkey risks an Article 5 violation.¹⁶⁶

Professors Lucas Lixinski and Vassilis P. Tzevelekos raised another UNESCO argument.¹⁶⁷ They stressed the secular stance of international cultural

158. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, *supra* note 151, art. 5.

159. Kirchmair, *supra* note 9.

160. World Heritage Convention, *supra* note 151, art. 6.

161. See *supra* notes 38–42 and accompanying text.

162. Gott, *supra* note 66; see also *Russian Orthodox Church Concerned by Fate of Byzantine Mosaics in Istanbul’s Hagia Sophia*, TASS (July 4, 2020, 6:29 PM), <https://tass.com/society/1174877>.

163. Ali Kucukgocmen, *Hagia Sophia Mosaics Will Be Covered with Curtains During Prayers: Turkish Presidential Spokesman*, REUTERS (July 19, 2020, 11:25 AM), <https://www.reuters.com/article/us-turkey-hagiasophia-erdogan/hagia-sophia-mosaics-will-be-covered-with-curtains-during-prayers-turkish-presidential-spokesman-idUSKCN24K0OS>.

164. Kirchmair, *supra* note 9.

165. Isil Sariyuce & Emma Reynolds, *Turkey’s Erdogan Orders the Conversion of the Hagia Sophia Back into a Mosque*, CNN, <https://www.cnn.com/2020/07/10/europe/hagia-sophia-mosque-turkey-intl/index.html> (last updated July 26, 2020, 1:54 PM).

166. Kirchmair, *supra* note 9.

167. Lucas Lixinski & Vassilis P. Tzevelekos, *The Hagia Sophia, Secularism, and*

heritage law and highlighted the possibility that re-converting the Hagia Sophia, by placing one religion over another, violates the spirit of the UNESCO Convention.¹⁶⁸ As the Convention is silent on the exact role of religion in UNESCO heritage sites,¹⁶⁹ this is, at best, a tenuous ground for finding a violation.

So, while there might potentially be a violation of the World Heritage Convention in the future in regard to the Hagia Sophia, as of now, there appears to be no violation unless a very stringent reading of Article 5 is employed. Enforcement poses an additional problem. Even if the World Heritage Convention did prohibit the re-conversion of the Hagia Sophia, the Convention lacks teeth, only listing endangered cultural heritage sites on the List of World Heritage in Danger rather than stipulating sanctions, injunctions, or other consequences.¹⁷⁰ Therefore, even if it did prohibit the re-conversion, the World Heritage Convention is a rather weak constraint on the status of the Hagia Sophia.

C. *Freedom of Religion*

The Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly in 1948, and in Article 18 it enshrined the right of freedom of religion.¹⁷¹ Later, the right of religion was given an enforcement mechanism through the International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976.¹⁷² Turkey ratified the ICCPR in 2003 and is thus a state party bound to its articles.¹⁷³ Greek Orthodox Christianity, the original religion of the Hagia Sophia, would appear to squarely fall within Article 18's ambit.

Yet despite seeming like a promising avenue for attacking the Hagia Sophia conversion, Article 18 suffers from the same problems that bedeviled the ECtHR approach. Similar to Article 9 of the European Convention on Human Rights, Article 18 of the ICCPR states:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.¹⁷⁴

International Cultural Heritage Law, AM. SOC'Y INT'L L. (Sept. 22, 2020), <https://www.asil.org/insights/volume/24/issue/25/hagia-sophia-secularism-and-international-cultural-heritage-law>.

168. *Id.*

169. *See id.*

170. World Heritage Convention, *supra* note 151, art. 11(4); *see also* Kirchmair, *supra* note 9.

171. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

172. G.A. Res. 2200A (XXI), (Dec. 16, 1966).

173. *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://indicators.ohchr.org> (last visited Apr. 30, 2021).

174. G.A. Res. 2200A (XXI), (Dec. 16, 1966).

So, like the European Convention on Human Rights, the ICCPR does not explicitly address the conversion of religious buildings in relation to religious rights. Even if it did, the same problem exists where the Hagia Sophia was converted from a museum to a mosque, not from a church to a mosque like in 1453, which could more easily be argued to be an act of religious intolerance.

The implementation of the ICCPR is overseen by the United Nation's Human Rights Committee.¹⁷⁵ One critical difference between the ECtHR and the Human Rights Committee is that the ECtHR can only respond to individual or country complaints, while the Human Rights Committee can utilize both Views (case decisions) and General Comments and Concluding Observations, which can be promulgated without individual complaints.¹⁷⁶ Concluding Observations are general reports on the state of a country's compliance with the human rights treaty, based on their periodic reports as well as those reports submitted by non-state actors.¹⁷⁷ The Human Rights Committee can address any aspect of Turkish society in its Concluding Observations, whether those issues are brought to them in individual complaints or not.¹⁷⁸ This allows a greater degree of flexibility than the ECtHR.

As of August 2020, the Human Rights Committee has only released one Concluding Observation on Turkey.¹⁷⁹ In its 2012 Concluding Observation on Turkey, the Human Rights Committee did not address the conversion or destruction of churches.¹⁸⁰ However, in other Concluding Observations on different countries, the Human Rights Committee has condemned the destruction of churches.¹⁸¹ But, again, the conversion of a museum to a mosque rather than directly from a church to a mosque might not be condemned. The Human Rights Committee could potentially have the flexibility to make such a determination, but without individuals being directly harmed, it may be reluctant to make such a broad determination.

175. *Human Rights Committee*, INT'L JUSTICE RESOURCE CTR., <https://ijrcenter.org/un-treaty-bodies/human-rights-committee/#:~:text=The%20Human%20Rights%20Committee%20is,its%20preparation%20of%20general%20comments%2C> (last visited Aug. 21, 2020).

176. *See Human Rights Committee Working Methods*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx> (last visited Aug. 21, 2020).

177. Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116, 116 (Helen Keller & Geir Ulfstein eds., 2012).

178. *See Human Rights Committee Working Methods*, *supra* note 176.

179. United Nations Human Rights Treaty Bodies, UN TREATY DATABASE, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5 (last visited Aug. 18, 2020).

180. Human Rights Committee, U.N. Doc. CCPR/C/TUR/CO/1 (Nov. 13, 2012).

181. *See e.g.*, Human Rights Committee, U.N. Doc. CCPR/C/SDN/CO/5, at ¶ 49–50 (Nov. 19, 2018).

D. *Cultural Rights*

Also relevant to the re-conversion of the Hagia Sophia is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which protects cultural rights.¹⁸² Article 15 of the ICESCR provides that everyone has the right to take part in cultural life without discrimination.¹⁸³ This includes the obligation of the state to undertake “the conservation, the development and the diffusion of . . . culture.”¹⁸⁴ In addition, Article 13 establishes a right to education, including an understanding that “education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.”¹⁸⁵ This would seem to encompass preserving Byzantine culture from centuries ago,¹⁸⁶ as well as preserving the culture of Turkey’s Greek minority, the descendants of the Byzantines.

Turkey is a signatory of ICESCR,¹⁸⁷ therefore the ICESCR’s provisions are binding. However, it is much less certain whether the Hagia Sophia’s re-conversion actually violates ICESCR. Like the European Convention on Human Rights and the ICCPR, the ICESCR does not specifically address religious buildings. But observers are worried that the Hagia Sophia’s change in status effectively sidelines Turkey’s culturally Christian minorities or worse.¹⁸⁸ Karima Bennouna, the UN Special Rapporteur on cultural rights, and Ahmed Shaheed, UN Special Rapporteur on freedom of religion, expressed concern about infringing upon the cultural and religious rights of groups such

182. G.A. Res. 2200A (XXI), (Jan. 3, 1976).

183. *Id.*

184. *Id.*

185. *Id.*

186. Upon conquering Constantinople, the Ottoman Sultan Mehmed II preserved aspects of Byzantine culture, including taking the title of Qayser-i Rum (Caesar of the Roman Empire) and supporting the Orthodox patriarch of Constantinople. Donald M. Nicol, *The Last Centuries of Byzantium 1261-1453* 392 (1993) (describing how Mehmed had George Scholarios enthroned as Patriarch Gennadios II, continuing the historical relationship between patriarch and emperor (the Byzantine Basileus), and positioning himself as Sultan Basileus).

187. U.N. Treaty Collection, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtldsg_no=IV-3&chapter=4&clang=_en.

188. See, e.g., Ewelina U. Ochab, *More Than a Building - Why Religious Minorities Are Concerned About the Hagia Sophia Conversion*, FORBES (Aug. 10, 2020, 6:37 AM), <https://www.forbes.com/sites/ewelinaochab/2020/08/10/more-than-a-buildingwhy-religious-minorities-are-concerned-about-the-hagia-sophia-conversion/?sh=61f6b5706cfe> (remarking that although the re-conversion decision may have been driven by a desire to win votes by the AKP, it is emblematic of a downward trend in religious freedom in Turkey); Demetrios Ioannou, *Hagia Sophia Conversion ‘Bad News’ for Turkey’s Marginalized Christians*, POLITICO (Aug. 6, 2020, 4:02 AM), <https://www.politico.eu/article/hagia-sophia-conversion-turkey-marginalized-christians-bad-news> (describing the dwindling numbers of Christians in Turkey and their fear that the re-conversion of the Hagia Sophia will fan anti-Christian sentiments in Turkey).

as Christians and encouraged Turkey to instead preserve the building as an inter-cultural and inter-religious space.¹⁸⁹ They also noted that changing the status of the Hagia Sophia could lead to skewed, or even discriminatory, education on the building and the history of the country.¹⁹⁰ The Greek Orthodox Archdiocese of America appealed to the United Nations to hold Turkey accountable “for its deliberate policies to erase the cultural heritage of Orthodox Christians.”¹⁹¹ Emeritus professor of Byzantine history, Judith Herrin, condemned the changed status of the Hagia Sophia as nothing less than “cultural cleansing.”¹⁹²

The nebulous nature of cultural rights makes it difficult to determine if the Hagia Sophia re-conversion, in and of itself, is actually a violation of the ICESCR. Unlike religious rights under the ICCPR, cultural rights can be tied to the legacy of and education about the Hagia Sophia, which makes the change from museum to mosque potentially problematic for cultural rights even though it is not a direct conversion from church to mosque. Most likely, how the Hagia Sophia is treated in the coming months and years will be crucial for determining whether Turkey’s actions are lawful or not. If the Hagia Sophia remains open to all and the Turkish educational curriculum and narrative presented at the Hagia Sophia itself continue to discuss prior civilizations such as the Byzantines, there is a much weaker argument that there is a violation of Articles 13 and 15 of ICESCR. On the other hand, if Christian symbols and icons are covered up permanently and the Byzantine past is marginalized or erased from the Hagia Sophia, a finding of a violation of cultural rights under the ICESCR would be likely.

E. *Minority Rights*

In addition to separate religious and cultural rights, there are also specifically enshrined rights for minorities under international law. In Article 27, the ICCPR specifies that in states where “ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”¹⁹³ Although minority rights are not specifically mentioned in the

189. Karima Bennoune & Ahmed Shaheed, *UN Experts: Turkey Should Preserve Hagia Sophia as Space for Meeting of Cultures*, UNITED NATIONS HUM. RTS. OFFICE OF THE HIGH COMMISSIONER (July 31, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26146&LangID=E>.

190. *See id.*

191. *Orthodox Church Petitions UN Over Istanbul’s Hagia Sophia*, ASSOC. PRESS (Sept. 29, 2020), <https://apnews.com/article/turkey-freedom-of-religion-istanbul-recep-tayyip-erdogan-christianity-e41979352205ab10fe56ee780cd6a949>.

192. Judith Herrin, *Converting Hagia Sophia into a Mosque is an Act of Cultural Cleansing*, WASH. POST (July 15, 2020, 8:00 AM), <https://www.washingtonpost.com/opinions/2020/07/15/converting-hagia-sophia-into-mosque-is-an-act-cultural-cleansing>.

193. G.A. Res 2200A (XXI), art. 27 (Dec. 16, 1966).

Universal Declaration of Human Rights (UDHR),¹⁹⁴ such rights are enshrined in the separate Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Declaration on Minorities), which was adopted by the United Nations General Assembly in 1992.¹⁹⁵ This Declaration is influenced by the ICCPR and goes further, stating that “[s]tates shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”¹⁹⁶ The Declaration includes specifically enumerated rights for minorities, including that “national policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.”¹⁹⁷ There is little doubt that the dwindling numbers of both ethnic Greeks and Orthodox Christians in Turkey count as minorities.¹⁹⁸

Turkey has long treated its minorities problematically, including a pogrom against Istanbul’s Greek minority in 1955 and attempts to eliminate the Kurdish language spoken by Turkey’s sizeable Kurdish minority.¹⁹⁹ In recent years, religious and cultural minorities have faced increased hostility from the Turkish government, including, in 2019, the destruction of Armenian, Assyrian, and Greek religious and cultural sites.²⁰⁰ Human rights experts worry that the re-conversion of the Hagia Sophia will only add to marginalization of minorities under Erdoğan’s government.²⁰¹

194. Johanna Gibson, *The UDHR and the Group: Individual and Community Rights to Culture*, 30 *HAMLIN J. PUB. L. & POL’Y* 285, 285 (2009).

195. G.A. Res 47/135, (Dec. 18, 1992).

196. *Id.*

197. *Id.*

198. Antonija Petričušić, *The Rights of Minorities in International Law: Tracing Developments in Normative Arrangements of International Organizations*, 11 *CROATIAN INT’L REL. REV.* 1, 3 (2005) (explaining how although the term “minority” is not defined in the Declaration on Minorities, the term would seem to clearly include religious and ethnic minorities, such as the Greeks in Turkey). At least the Greek population of Constantinople is officially recognized as a minority pursuant to the Treaty of Lausanne, albeit the Treaty defines them by their Greek Orthodox religion rather than their race. Convention Concerning the Exchange of Greek and Turkish Populations Signed at Lausanne, arts. 1–2 (Jan. 30, 1923).

199. See Laure Almairac, *Turkey: A Minority Policy of Systematic Negation*, *INT’L HELSINKI FED’N HUM. RTS.* 1, 11–14 (2006).

200. Ochab, *supra* note 188.

201. See, e.g., *id.* The re-conversion of the Hagia Sophia adds to pre-existing worries about the condition of Christian minorities in Turkey. See U.S. DEPT. OF STATE, 2019 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: TURKEY (2019), <https://www.state.gov/reports/2019-report-on-international-religious-freedom/turkey> (concluding that in 2019 the Turkish government continued to limit the rights of non-Muslim religious minorities); Ramazan Kiling, *Christians Have Lived in Turkey for Two Millennia – But Their Future Is Uncertain*, *CONVERSATION* (Nov. 21, 2019, 8:58 AM), <https://theconversation.com/christians-have-lived-in-turkey-for-two-millennia-but-their-future-is-uncertain-127296> (detailing some of the ways in which religious tolerance has decreased in Turkey in the past decade). There have been some positive developments in religious tolerance, such as the Turkish restoration of the significant

Like with religious rights, the argument that the change to the Hagia Sophia is a violation of minority rights is undermined by the fact that in its most recent change, the Hagia Sophia was transformed from a museum to a mosque, not from a church to a mosque. Because a church was not liquidated or converted, it is unlikely under the text alone that the re-conversion would violate Article 27 of the ICCPR since it is not actively harming a religious minority. However, the Declaration on Minorities specifies that States Parties “shall encourage conditions for the promotion of that identity.”²⁰² Transforming such an important structure for both Christianity and Islam into a mosque for the majority Muslim population would seem to run directly counter to this purpose. However, unlike the human rights treaties, the Declaration on Minorities is non-binding since it is a UN General Assembly resolution.²⁰³ But it is still an important international legal norm for how to treat minorities.²⁰⁴ In particular, given that the Declaration on Minorities stemmed from Article 27 of the ICCPR, a seeming violation of the Declaration could suggest a violation of minority, or even religious or cultural rights. But it is far from certain whether the conversion of the Hagia Sophia, in and of itself, would actually violate Article 27 based solely on the nebulous general legal norm of the Declaration on Minorities.

F. *Law on Conquest*

On the other side of the individual rights arguments, the rhetoric surrounding the re-conversion of the Hagia Sophia has been replete with references to conquest. Territorial conquest is banned under international law, with the United Nations Charter prohibiting the use or threat of force.²⁰⁵ The prohibition on conquest has become an international norm, a bedrock principle of the modern international system.²⁰⁶ Yet the prohibition on conquest is very unlikely to apply to the Hagia Sophia case.

Armenian churches on Akhtamar, an island in Lake Van, which has been opened for Armenian Christian worship once a year. Tugba Tanyeri-Erdemir, *Cultural Heritage Diplomacy Needs to Be Part of Biden's Turkey Outreach*, MIDDLE E. INST. (May 25, 2021), <https://www.mei.edu/publications/cultural-heritage-diplomacy-needs-be-part-bidens-turkey-outreach>. But the general trend has been decreasing tolerance and increased tensions.

202. G.A. Res 47/135, (Dec. 18, 1992).

203. Dieter Kugelman, *The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity*, 11 MAX PLANCK Y.B. U.N. L. 233, 244 (2007).

204. Yousef T. Jabareen, *Redefining Minority Rights: Successes and Shortcomings of the U.N. Declaration on the Rights of Indigenous Peoples*, 18 U.C. DAVIS J. INT'L L. & POL'Y 119, 134 (2011).

205. U.N. Charter art. 2, ¶ 4.

206. See Eugene Kontorovich, *International Responses to Territorial Conquest*, NORTHWESTERN UNIVERSITY SCHOOL OF LAW FACULTY WORKING PAPERS, 2009, at 1–2.

The city of Constantinople was conquered by the Ottoman Empire from the Byzantine Empire in 1453. At that point in history, conquest was the international norm. The United Nations Charter does not act retroactively in reversing historic conquests and restoring the territorial status quo of some time immemorial. Istanbul, and the Hagia Sophia, have been Turkish or Ottoman territories for over 500 years. The conversion of the Hagia Sophia is clearly not an example of territorial conquest.

Erdoğan's conquest-laden rhetoric regarding the Hagia Sophia does not change this reality. In addition to citing waqf law, Erdoğan and his government have actively invoked the spirit of conquest of Mehmed II.²⁰⁷ Yet while this rhetoric raises international political tensions,²⁰⁸ it does not change the very nature of the act of conversion. The Hagia Sophia has been Turkish for centuries and even if the act of conversion is symbolically a "conquest," it cannot be said to violate the United Nations Charter or the international norm against conquest.

V. FUTURE PROTECTION FOR UNIVERSAL RELIGIOUS SITES

The picture of domestic and international law leaves potential possibilities for reversing the re-conversion of the Hagia Sophia, but they are far from certain. Indeed, one of the biggest issues with protecting the Hagia Sophia's previous status as a museum is the fact that it is part of an especially complicated class of religious sites for which domestic and international law has not yet been developed.

Sacred spaces are a distinctly difficult category of cultural heritage to protect given that there is not only a need for physical preservation, but also the protection of religious use and respect for the spiritual significance of the site.²⁰⁹ As scholar Leonard Hammer has argued, the unique nature of sacred spaces merits a form of international legal protection that goes beyond what is currently available under international law.²¹⁰ But while Hammer argued for protection for all religious spaces as a unit,²¹¹ the Hagia Sophia and similar sites pose additional problems.

Sites like the Hagia Sophia are not simply sites of a singular religious identity but have a mixed history of serving as a significant religious place for multiple extant religions. I term these sites "universal religious sites." Universal religious sites have, over their history, served as houses of worship or pilgrimage sites for more than one religion. Accordingly, multiple religious communities may have separate, and possibly conflicting, connections or rights to the site. This puts those religious communities in a potentially problematic position

207. Erdemir & Tanyeri-Erdemir, *supra* note 134.

208. *Id.*

209. Hammer, *supra* note 10, at 75.

210. *Id.* at 76, 95–96.

211. *See id.* at 98.

where they could spark interreligious and political conflict, but they also have the potential to serve as points of interfaith communion and commonality.

While universal religious sites are not exactly common, there are many notable examples beyond just the Hagia Sophia. In Córdoba, Spain, La Mezquita served as the main mosque for the Umayyad caliphs of Córdoba and their successors during the Middle Ages, but was converted into a cathedral by Ferdinand III (r. 1217–1252) of Castile in the thirteenth century.²¹² In Ayodhya, India, the Moghul emperor Babur (r. 1526–1530) built the Babri Mosque on a site believed to be the birthplace of the Hindu deity Rama.²¹³ The mosque was demolished by Hindus in 1992 and a controversial Indian court ruling in 2019 gave the site to Hindus to build a temple to Rama.²¹⁴ In Jerusalem, the Temple Mount is sacred to both Jews and Muslims, which has increased tensions between the two religions at times.²¹⁵ Even inside Turkey itself, numerous other mosques were previously important Byzantine churches, such as the Chora Church and the Hagia Sophias in Iznik and Trabzon.²¹⁶ This list only scratches the surface of the catalog of universal religious sites in the world.

Anthropologist Khalid Yacine argued that the use of the Hagia Sophia as a mosque—compared to the active demolition of religious buildings or the banning of Arabic in converted mosques—is benign.²¹⁷ But this distinction highlights the problem rather than articulating an exception. As demonstrated by the furor caused by the ban on Muslim prayer in La Mezquita or the building of a Hindu temple on the site of the Babri Mosque in Ayodhya, these points of shared religious significance can be powder kegs for conflict. The Hagia Sophia, as an emotionally charged shared space of religious importance for

212. *Historic Centre of Cordoba*, UNESCO WORLD HERITAGE CONVENTION, <https://whc.unesco.org/en/list/313> (last visited Aug. 19, 2020). Attempts to whitewash La Mezquita's history as a mosque led to hundreds of thousands signing a petition in protest and the Islamic Educational, Scientific, and Cultural Organization condemning the action. A blanket ban on Muslim prayers inside the building has also been criticized. Eric Claderwood, *The Reconquista of the Mosque of Córdoba*, FOREIGN POL'Y (Apr. 10, 2015, 12:32 PM), <https://foreignpolicy.com/2015/04/10/the-reconquista-of-the-mosque-of-cordoba-spain-catholic-church-islam>.

213. *Timeline: Babri Mosque-Ram Temple Case*, AL JAZEERA (Nov. 9, 2019), <https://www.aljazeera.com/news/2019/11/timeline-babri-mosque-ram-temple-case-191108225122075.html>.

214. Lauren Frayer & Sushmita Pathak, *At Site of Razed Mosque, India's Modi Lays Foundation for Controversial Hindu Temple*, NPR (Aug. 5, 2020, 8:22 AM), <https://www.npr.org/2020/08/05/899247507/at-site-of-razed-mosque-indias-modi-lays-foundation-for-controversial-hindu-temp>.

215. Elon Gilad, *The History of the Temple Mount: Where Gods Collide*, HAARETZ (Nov. 19, 2014), <https://www.haaretz.com/archaeology/premium-the-history-of-the-temple-mount-1.5331578>.

216. Peter Kenyon, *Some Turkish Churches Get Makeovers – As Mosques*, NPR (Dec. 3, 2013, 3:27 PM), <https://www.npr.org/sections/parallels/2013/12/03/248355379/some-turkish-churches-get-makeovers-as-mosques>.

217. Adam Bensaid, *The Law, and Origin Story of Istanbul's Iconic Hagia Sophia*, TRT WORLD (July 10, 2020), <https://www.trtworld.com/magazine/the-law-and-origin-story-of-istanbul-s-iconic-hagia-sophia-38029>.

both Christians and Muslims, is no different. Conquest is no longer a lawful objective, and universal stability and peace are the goals of international law. There is therefore a strong interest in maintaining a neutral position on these controversial sites. A workable solution can be taken from the example of the Hagia Sophia: remain a neutral museum,²¹⁸ or, as some have suggested, be open to all of the affected religions or all religions more generally in some workable arrangement.²¹⁹ This would maintain a neutral approach to these highly contested spaces rather than spark more conflict by allowing political or cultural interests to raise one religion above another.

At present, there are no special international legal provisions for universal religious sites. However, a future cultural heritage convention could provide for maintaining the status quo, protecting or establishing museum status or opening these sites equally to all religions. The model could be similar to the World Heritage Convention, with countries nominating their specific universal religious to be included in lists maintained by UNESCO. In addition, to counter the sort of situation presented by the Hagia Sophia re-conversion, perhaps foreign countries should also be able to nominate universal religious sites inside a country.

An alternative structure would be to have the Human Rights Committee broaden its interpretation of the ICCPR to protect religious and universal rights in these long-standing shared sacred spaces. Indeed, this approach was the one suggested by Hammer in his article on the protection of religious sites.²²⁰ Hammer advocated for using the existing human rights framework to interpret the protection of religious sites as part of the individual rights of affected communities.²²¹ As the Human Rights Committee is not forced to respond to only individual claims like the ECtHR, it has greater freedom to render its human rights opinions. This freedom is essential to allowing more judicial activism from the Human Rights Committee in preventing interreligious conflict over the changed nature of universal religious sites. This is not out of line with precedent; for example, as early as 2007, the Human Rights Council promulgated resolutions calling on states to respect religious sites.²²² In addition, regional

218. See, e.g., *UN Experts Urge Turkey to Use Hagia Sophia as 'Intercultural Space'*, AL-MONITOR (July 31, 2020), <https://www.al-monitor.com/pulse/originals/2020/07/turkey-un-hagia-sophia-unesco-mosque-convert-erdogan-prayers.html>; Elif Shafak, *Erasing Histories: Why Turkey's Hagia Sophia Should Remain a Museum*, NEW STATESMAN (July 20, 2020), <https://www.newstatesman.com/culture/art-design/2020/07/erasing-histories-why-turkey-s-hagia-sophia-should-remain-museum>.

219. See, e.g., Mustafa Akyol, *Hagia Sophia Could Be a Mosque/Church*, HÜRRIYET DAILY NEWS (May 7, 2014), <https://www.hurriyetdailynews.com/opinion/mustafa-akyol/hagia-sophia-could-be-a-mosquechurch-66074>; Peter Dzedzic, *Hagia Sophia Shouldn't Be a Mosque or a Church—It Should Be Both*, AM. MAG. (July 23, 2020), <https://www.americamagazine.org/faith/2020/07/23/hagia-sophia-shouldnt-be-mosque-or-christian-church-it-should-be-both>.

220. Hammer, *supra* note 10, at 98.

221. *Id.* at 102.

222. Human Rights Council Res. 6/37, U.N. Doc. A/HRC/RES?6/37, ¶ 8, 9(k) (Dec. 14,

courts such as the ECtHr could similarly broaden their interpretation of the right to freedom of religion when proper cases are brought before them.

Under either model, a significant rationale is not just interreligious harmony, but also universal access to education. These sites provide an enormous wealth of cultural, religious, political, and artistic history. Greek law professor Spyros Vlachopoulos suggested that the right to education should be interpreted to preserve sites of universal cultural heritage.²²³ This basis could be used to convince signatories to sign onto a future universal religious site convention or provide an alternative legal basis for the Human Rights Committee's decisions on universal religious sites.

In response to the conversion of the Hagia Sophia, UNESCO director-general Audrey Azoulay stated that the Hagia Sophia "reflects the universal nature of its heritage," which "makes it a powerful symbol for dialogue."²²⁴ Azoulay speaks directly to the importance of universal religious sites. The conversion of the Hagia Sophia, even if it is lawful in theory, is against international policy in practice, glorifying sovereignty over international cooperation.²²⁵ Increased protections for universal religious sites would help prevent similar flashpoints of interreligious conflict in the future.

CONCLUSION

The re-conversion of the Hagia Sophia presents a dangerous precedent for exacerbating religious conflict. Only a month after the Hagia Sophia was re-converted, the Chora Church in Istanbul was also re-converted by presidential decree.²²⁶ Turkish law provides potential grounds of collateral attack against the conversions, primarily through analyzing how waqfs have been modified in practice and the religious motivations behind the re-conversions, which are prohibited by the Turkish Constitution. Turkey is at the crossroads of many civilizations, and these restrictions may be vital in preserving spaces of shared religious importance. But on an international law scale, the current options for limiting the conversion of universal religious sites are limited, with the European Court of Human Rights, the World Heritage Convention, the ICCPR, the ICESCR, the Declaration on Minorities, and law against conquest all failing to provide clear restrictions on such actions. Creating international law guidance specifically regarding universal religious sites, either through a cultural heritage treaty or a broader interpretation of human rights, could offer improved protection for such sites. It would also open opportunities for dialogue rather than posing issues of cultural isolation and interreligious conflict, as created by the conversion of the Hagia Sophia.

2007) (relying on Article 18 of the ICCPR).

223. Vlachopoulos, *supra* note 9.

224. *UNESCO Expresses Deep Regret over Turkey Decision to Change Status of Historic Hagia Sophia*, *supra* note 156.

225. Kirchmair, *supra* note 9.

226. *Presidential Decree Issued to Turn Chora Church into Mosque*, *supra* note 61.