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The cover photograph shows four anthropoid sarcophagi. Deir al-Balah. 14th-13th century BCE. Collection of Israel Museum, Jerusalem (Gift of Wilma and Lawrence Tisch). Photograph: Israel Museum.

These sarcophagi, stolen from Deir al-Balah in the Occupied Palestinian Territories, were acquired by the notorious antiquities collector Moshe Dayan, who held posts in various Israeli administrations as Minister of Defense and Minister of Foreign Affairs. Following Dayan's death in 1981, his collection of antiquities, including these coffins, was sold to the Israel Museum.

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1. INTRODUCTION

Conquest and occupation throughout the centuries have been accompanied on many occasions by a victorious power's seizure of a defeated country's antiquities and works of art and the destruction of its national monuments. One only has to think of Napoleon's plunder of the major art collections of Italy in the late eighteenth and early nineteenth century or Germany's confiscation of all types of cultural property in the territories which it occupied during World War II or, more recently, during the Gulf War of 1990, Iraq's removal of the contents of Kuwait's major museums to Baghdad and Iraq's loss of a large number of its own archaeological artifacts during the subsequent occupation of Iraq. It is perhaps not surprising therefore to discover that during its 30-year occupation of the West Bank and the Gaza Strip, Israel has indulged in the plunder of antiquities and has been responsible for damaging and even destroying historic monuments.

There has been widespread documentation of Israeli human rights abuses and breaches of international humanitarian law in the Occupied Palestinian Territories (OPT), particularly since the beginning of the Palestinian *Intifada* (uprising) in 1987. In contrast, little is known about Israel's systematic violation of the international rules regarding protection of cultural property during armed conflict. The question attracted a great deal of media attention during the early 1970s, particularly after UNESCO's General Conference voted to cut off assistance to Israel because of Israel's persistent refusal to comply with the resolutions of the UNESCO Executive Board and General Conference requesting Israel to desist from carrying out archaeological excavations in East Jerusalem. There has, however, been little discussion of Israeli abuses outside Jerusalem, even though no area of the West Bank and the Gaza Strip remains unaffected by Israel's actions with regard to cultural property.

This report attempts to provide a comprehensive legal analysis of Israel's policies concerning cultural property in the OPT. For the purposes of this study, the definition of cultural property contained in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention of 1954) will be used.[1] Section 2 of this study describes

[1] Article 1 of the Hague Convention of 1954 defines cultural property as:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other

and analyses the relevant provisions of international law on protection of cultural property. Section 3 discusses how these rules have been applied in the OPT and specifically examines Israel's position on the applicability of these rules to the OPT and the use of the enforcement mechanisms provided by the Hague Convention of 1954. In Section 4 the provisions of domestic law concerning protection of cultural property are described. Section 5 looks at the various types of violations committed by Israel in the OPT: illegal excavations, removal of cultural artifacts, seizure of immovable cultural property, and damage to and destruction of immovable cultural property. It is beyond the scope of this report to provide comprehensive details on violations and therefore Section 5 is confined to identifying patterns and providing case studies. Section 6 explains Israeli obligations to make reparations for these breaches of international law by paying financial compensation, returning movable cultural property to the OPT, and prosecuting persons who have authorized or perpetrated these abuses.

This report is particularly timely as it is published after the formal opening of Israeli-Palestinian negotiations to achieve a permanent settlement to the Israeli-Palestinian conflict. Under the terms of the Declaration of Principles on Interim Self-Government Arrangements for Palestinians (DOP), these negotiations must be completed by May 1999[2]. The settlement of Palestinian claims against Israel for the return of all cultural property removed from the OPT since 1967 is postponed until these negotiations. Section 6 examines the question of whether Israel is, as claimed by the Palestine Liberation Organization and Palestinian National Authority, under a duty to return all these artifacts.

Section 7 provides recommendations to all concerned parties: Israel, the PLO, the PNA, the international community and non-governmental bodies, such as museums, as to how the implementation of international law of cultural property can be improved with regard to the OPT.

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objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as `centres containing monuments'.

2 Declaration of Principles on Interim Self-Government Arrangements for Palestinians. (Washington, DC) 13 September 1993, article 1.

2. INTERNATIONAL STANDARDS RELEVANT TO THE PROTECTION OF CULTURAL PROPERTY IN OCCUPIED TERRITORY

2.1 Introduction

A large number of legal standards, particularly international treaties, have been developed by the international community during the twentieth century to assist in the protection of cultural property during times of war and times of peace. In this section we will concentrate on examining those standards by which the Israeli government is bound in relation to its conduct in the OPT: the Fourth Hague Convention concerning the Laws and Customs of War on Land (Hague Convention of 1907) and its regulations (Hague Regulations of 1907); the Fourth Geneva Convention Concerning the Protection of Civilian Persons in Time of War of 1949 (Fourth Geneva Convention of 1949); and the Hague Convention, Protocol and Regulations of 1954. It will be noted that all these standards are part of the law of armed conflict. Israel has chosen not to accede to the two major UNESCO Conventions which protect cultural property during peacetime and wartime alike: the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 and the Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972.

There will be also a brief of examination of the Code of Professional Ethics of 1986, which was prepared by the International Council of Museums (ICOM). Since this code was developed by a non-governmental organization it does not contain binding international legal rules. These standards are, however, relevant to this study's examination of the attitude of Israeli and other foreign museums towards acquiring or exhibiting cultural property which has been illegally removed from the OPT as the code attempts to ensure that ICOM members respect international standards concerning protection of cultural property.

This study will not deal with Israel's obligations under article 15 of the International Covenant on Economic, Social and Cultural Rights to work toward the full realization of cultural rights. The omission is not meant to deny the importance of the implementation of this right in the OPT. Very little attention, however, has been devoted to the question of cultural rights in human rights theory and jurisprudence. Consequently a great deal of uncertainty exists as to the content of the right to culture. An exploration of this question reaches beyond the scope of this study.

2.2 The Hague Regulations of 1907

The Hague Regulations of 1907 constituted a codification of the existent laws and customs of war in 1907. The regulations contain a number of provisions dealing with the protection of property in occupied territory. The convention and its regulations reflect the trend exhibited in the nineteenth century toward increased protection in armed conflict of private property, especially cultural property.[3]

The Hague Regulations of 1907 distinguish between state-owned property and private property, with the latter receiving a higher level of protection. Article 46 establishes as a general principle that private property must be respected and cannot be confiscated. Article 47 prohibits pillage, *i.e.* "the forcible taking of private property by an invading or conquering army from the enemy's subjects."[4] According to article 52, private property may be requisitioned, but this is only permissible if such property is necessary for the needs of the army of occupation. According to this stipulation, nearly all types of cultural property would be immune from requisition.

State-owned property receives a reduced but still extensive degree of protection under the regulations. According to article 53, state-owned movable property may be used only for military operations. As far as state-owned immovable property is concerned, the occupier is regarded only as the administrator and usufructor of such property, *i.e.* it can take the profits or proceeds arising out of immovable property, but it must preserve the capital value of the property.

Although not explicitly stated in the Hague Regulations of 1907, it is generally agreed that an occupant is also entitled to expropriate state-owned or private property if this is for the benefit of the local population.[5] The expropriation of land containing cultural property by an occupant can be regarded therefore as legal under the Hague Regulations of 1907 if it is done in good faith and is in the public interest.

Article 56 accords a privileged status to certain kinds of cultural property. The provision states:

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[3] Stanislaw Nahlik, "La protection internationale des biens culturels en cas de conflit armé," *Recueil des cours de l'Académie*, Vol. 120 (II) (1967), p. 61, 83.

[4] *Black's Law Dictionary* 5th ed. (St. Paul: West Publishing Co., 1979) p. 1033.

[5] Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: University of Minnesota Press, 1957) p. 165.

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
>
> All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

It can be seen that two types of cultural property are protected. The first type is accorded protection because of its intrinsic nature, for example, historic monuments and works of art and science. The second type of property receives protection because of the purpose to which it is devoted, for example, buildings devoted to religion, education, art or science.

Article 56 provides two different classes of protection. Firstly it accords to state-owned institutions dedicated to religion, education, art and science the status of private property, thereby increasing their degree of protection. Secondly, it absolutely prohibits seizure, destruction or intentional damage to these classes of institutions, as well as to historic monuments and works of art and science.

The Hague Convention and Regulations of 1907 are now universally regarded as reflective of customary international law and are, therefore, binding on all states, whether they have ratified the convention or not.[6]

2.3 The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949

The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 provides general protection to civilians caught up in armed conflict. It contains a section specifically dealing with the protection of civilian persons in occupied territories.

Article 53 of the Fourth Geneva Convention of 1949 prohibits the occupying power from destroying all types of property in occupied territory except on certain limited grounds. It states:

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[6] Gerhard von Glahn, *Law among Nations: An Introduction to Public International Law*, 7th ed. (Boston: Allyn and Bacon, 1995) p. 663.

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Article 33 of the convention prohibits pillage. In his authoritative commentary on the treaty, Jean Pictet explains that this prohibition does not apply only to individual acts of pillage, but also to organized pillage by the occupying authorities.[7] Article 33 requires the High Contracting Parties to prevent, or, if such activities nevertheless occur, to put a stop to individual pillage and to bring persons who commit such acts to justice.

Article 1 of the Fourth Geneva Convention of 1949 requires the high contracting parties "to respect and ensure respect for the present Convention in all circumstances." A state which has ratified the treaty is, therefore, not only required to respect the provisions of the Fourth Geneva Convention of 1949 itself but also to ensure that other states respect its provisions.[8] In its annual report on human rights violations in the OPT during 1989, al-Haq explained the nature of this second obligation:

> This duty amounts to an ongoing charge upon the High Contracting Parties to see that the provisions of the Conventions are enforced wherever and whenever they apply. In the case of a breach of the Fourth Geneva Convention by the occupying power, High Contracting Parties must use lawful means at their disposal to bring the offending state into compliance with the Convention in order to ensure that protected persons (*i.e.*, those protected by the Convention) actually receive the benefits of the protections set out in the Convention.[9]

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[7] Jean Pictet, *Commentary*, Vol. 4 of *The Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1952-60) p. 226.

[8] Al-Haq, *A Nation under Siege* (Ramallah: al-Haq, 1990) p. 644.

[9] *Ibid.*

It is clear that third party states who have ratified the Fourth Geneva Convention of 1949 are under a duty to prevent an occupying power which has ratified the convention from engaging in the destruction and pillaging of cultural property since these are violations of articles 33 and 53 of the convention.

2.4 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954

During the Second World War rules protecting cultural property were systematically violated and the inadequacies of these standards were exposed. Particularly notable was the systematic looting of cultural property by the Nazi regime in the territories occupied by Germany and the destruction of many buildings of great historic and artistic significance, as well as of individual objects, by both the Axis Powers and the Allied Powers during aerial bombardments. These events prompted the international community to develop a treaty which dealt specifically and more comprehensively with the protection of cultural property in armed conflict—the Hague Convention of 1954. The treaty is based on the idea that the conservation of cultural property is not only an internal affair for the particular state on the territory of which that property is located, it is also a matter of concern for all states. As such, it is important to provide such property with international protection.[10] The treaty is founded on the twin concepts of "safeguard" and "respect". States parties are required firstly to take initiatives during peacetime to safeguard cultural property in the event of war and secondly to respect such property during an armed conflict or military occupation.[11] This paper will concentrate on the provisions regulating the conduct of a belligerent occupant in occupied territory.

One of the innovative aspects of the convention is its introduction of a single comprehensive definition of cultural property encompassing all objects which attract protection. The definition contained in article 1 is very broad-ranging, covering three categories of property. The first part of the definition relates to "movable or immovable property of great importance to the heritage of every people" and is accompanied by a comprehensive list of examples,

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[10] Stanislaw Nahlik, "Protection of Cultural Property," in *International Dimensions of Humanitarian Law* (Paris and Geneva: UNESCO and the Henry Dunant Institute, 1988) p. 205.

[11] Jiri Toman, *La protection des biens culturels en cas de conflit armé* (Paris: UNESCO, 1994) pp. 74-5.

including monuments, archaeological sites, works of art and objects of artistic, historical or archaeological interest, including manuscripts and books. The second category relates to buildings whose main and effective purpose is to preserve or exhibit movable cultural property, such as museums, libraries and depositories of archives. The third category includes centers containing a large amount of cultural property, such as the old quarters of certain cities, for example Venice or the Old City of Jerusalem. Such areas are protected in their entirety.

Article 4(3) of the treaty imposes a duty on parties to the treaty to prohibit, prevent and, if necessary, halt acts of vandalism, as well as theft, pillage, or misappropriation of cultural property. The prohibitions on pillage and vandalism are derived from the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949 and are, in any event, prohibited under customary international law. An express duty to prohibit theft is a new development and would appear to apply to all forms theft, whether committed by members of a state's armed forces, or by civilians, or by the state itself. Article 4(3) also requires states to refrain from requisitioning movable cultural property situated in the territory of another high contracting party. The obligations contained in article 4(3) are absolute and are not subject to any limitation. Article 4(4) and 4(5) prevent a state party from conducting reprisals against cultural property.

Article 5 is specifically devoted to special issues arising in situations of occupation. It has been argued that a military occupant is only under a duty to apply article 5 if the ousted state exercised sovereignty over the territory occupied. It is submitted that article 5 should be read to cover all cases of occupation, even if the ousted state only exercised *de facto* control. Such an interpretation better accords with article 18 of the convention which clearly applies to all situations of occupation.

Article . 5 gives an occupying power relatively limited powers to act to protect cultural property in occupied territory. The provisions reflect the concerns of delegates at the UNESCO intergovernmental conference of 1954, where the convention was drafted, about giving too much power to the occupant. Memories of Germany's systematic removal of cultural property from the states which it occupied were fresh in the minds of the conference participants. UNESCO proposed at the conference that an occupying power should be required "to safeguard" cultural property, *i.e.* to take positive measures to ensure the conservation of cultural property in occupied territory. This phrasing was rejected by the conference which was

afraid that an occupant could exploit this duty in order to undermine the national character of cultural property.[12]

Article 5(1) of the convention only accords the occupant a subsidiary role in the protection of the cultural property in an occupied territory. The occupant is required to "support the competent national authorities of the occupied country in safeguarding and preserving its cultural property."[13] According to article 5(2) if the competent authorities are unable to take measures to preserve cultural property which has been damaged by military operations, the occupying power is required "in close co-operation with such authorities, [to] take the most necessary measures of preservation." However, the convention does not clarify the extent of an occupant's powers if there is a total collapse in government following occupation and no such authorities exist. Certainly the spirit of the convention appears to be against giving the occupant extensive powers in such a situation.

2.4.1 The Legality of Archaeological Excavations in Occupied Territory under the Hague Convention of 1954

The Hague Regulations of 1907 and the Hague Convention of 1954 do not contain any provisions dealing explicitly with the question of the legality of archaeological excavations in occupied territory. During the 1954 intergovernmental conference, the Greek delegate proposed the inclusion in the treaty of a provision which would have forbidden explicitly the conduct of excavations by an occupying power in occupied territory without the consent of the ousted state.[14] This amendment was rejected by a narrow majority, probably because it was proposed at a very late stage of the conference.

The only provision which deals specifically with the question of archaeological excavations in occupied territory is contained in the UNESCO Recommendation on International Principles Applicable to Archaeological

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[12] *Ibid.* p. 102.

[13] Stanislaw Nahlik writes, "La convention n'admet ici la compétence de l'occupant qu'à titre subsidiaire; elle l'oblige à assurer dans ce domaine au maximum la force d'agir à des autorités locales. Vu les expériences de la seconde guerre mondiale où la siddeerstelling n'était qu'un synonyme du pillage, on a formulé ces clauses confèrant certains droits à l'occupant avec une extrême circonspection" (Nahlik, "La Protection Internationale," pp. 123-4).

[14] Government of the Netherlands, *Intergovernmental Conference Convention on the Protection of Cultural Property in the Event of Armed Conflicts, The Hague, 1954: Records of the Conference* (The Hague: Staatsdruckkerij, 1961) pp. 209, 211. See also Toman, *La protection des biens culturels*, p. 106.

Excavations which was adopted by the UNESCO General Conference at its ninth session in New Delhi on 5 December 1956.

Article 32 of the recommendation states:

> In the event of armed conflict, any Member State occupying the territory of another State should refrain from carrying out archaeological excavations in the occupied territory. In the event of chance finds being made, particularly during military works, the Occupying Power should take all possible measures to protect these finds, which should be handed over, on the termination of hostilities, to the competent authorities of the territory previously occupied, together with all documentation relating thereto.

UNESCO's General Conference adopts such recommendations by a simple majority. Although they indicate a recommended course of action for member states, they are not legally binding *per se*.[15]

Despite the absence of an explicit legal prohibition in the Hague Convention of 1954, the question arises whether excavations in occupied territory are prohibited implicitly by the law of belligerent occupation. There has been very little state practice on this issue since most occupations are of short duration and occupying powers, therefore, do not generally involve themselves in archaeological excavations. Israel's occupation of the OPT, Sinai and the Golan Heights in 1967 is the only situation where the issue of the legality of excavations by an occupying power appears to have arisen. No general consensus has been reached as to whether such excavations contravene international law. Israel has adopted the position that excavations are not prohibited by the Hague Convention of 1954 and are, therefore, not illegal.[16] Jordan and Syria have argued that excavations fall foul of the prohibition on destruction of cultural property (including archaeological

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[15] Lyndel Prott and Patrick O'Keefe, *Discovery and Excavation*, Vol. 1 of *Law and the Cultural Heritage* (Abingdon: Professional Books, 1984), p. 77.

[16] Report of Dr. Karl Brunner, Commissioner-General for Cultural Property accredited to the Arab states. UNESCO Ref. No. 83 EX/12 Annex I, p. 5 para. 3(c)(bb).

sites) contained in the Hague Convention of 1954 because excavations, through their destruction of historical strata, actually destroy archaeological sites.[17] The two original commissioner-general appointed following the outbreak of the 1967 war to assist in the implementation of the Hague Convention of 1954 held divergent positions.[18] Mr. Reinink, commissioner-general accredited to Israel, took the view that excavations were not prohibited by the Hague Convention of 1954 but only by the UNESCO Recommendation of 1956, which was not legally binding.[19] Dr. Karl Brunner, commissioner-general accredited to the Arab states, was of the opinion that the Hague Convention of 1954 did prohibit archaeological digs by the occupant, adopting a similar interpretation to that of Jordan and Syria.[20] The director-general of UNESCO, in a report to UNESCO's Executive Board stated that although the provision of the 1956 Recommendation went beyond the explicit obligations of the Hague Convention of 1954, it could be argued that the prohibition on excavations by the occupying power was implicit in the protection accorded to archaeological sites by article 1 of the Convention.[21]

Few jurists have dealt with this subject. James Nafziger describes the convention as "ambiguous".[22] Gordon Lang states that the illegality of excavations in occupied territory is far from being clearly established.[23] Talia Einhorn regards archaeological excavations as permissible under international law, relying on the fact that there is no express provision in the Hague Convention of 1954 prohibiting them.[24] Talia Einhorn further argues that it is not necessary for the convention to forbid excavations since, in any event, the Hague Protocol of 1954 places the occupying power under a duty not to export any artifacts and to return any artifacts to the occupied territory if this

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[17] *Ibid.* pp. 4-5, para. 3(c)(bb).

[18] See sections 2.4.2 and 3.2 for a discussion of the role of the commissioners-general.

[19] Report of Professor H. Reinink, Commissioner-General for Cultural Property accredited to Israel. UNESCO Ref. No. 83 EX/12 Annex II, p. 1.

[20] UNESCO Ref. No. 83 EX/12, Annex 1, p. 5 para. 3(c)(bb).

[21] Report of the Director-General to the Executive Board of UNESCO. UNESCO Ref. No. 83 EX/12, p. 4.

[22] James Nafziger, "UNESCO-Centered Management of International Conflict over Cultural Property," *Hastings Law Journal*, Vol. 27 (1976), pp. 1051, 1058.

[23] Gordon Lang, "UNESCO and Israel," *Harvard International Law Journal*, Vol. 16 (1975), pp. 676-7.

[24] Talia Einhorn, "Restitution of Archaeological Artifacts: The Arab-Israeli Aspect," *International Journal of Cultural Property*, Vol. 5 (1996), pp. 133, 139.

provision is breached.[25]

Einhorn implies that the conduct of excavations by an occupying power lacks any serious consequences which cannot be remedied by the operation of the Hague Protocol of 1954. Archaeology, however, has been an important ideological tool in the hands of many states and in the context of an armed conflict there may additional incentives for an occupying power to use archaeology for its own political ends in an occupied territory in order to assert its rights to that territory. In addition, the conduct of excavations by an occupant denies the right of the ousted state and its people to explore its past in the manner which they deem appropriate, a manner which may be very different from that considered appropriate by the occupying power.

It is submitted here that archaeological excavations should be regarded as a violation of the Hague Convention of 1954. As Jordan and Syria have argued, archaeological excavations are destructive by their very nature and therefore *prima facie* are prohibited by article 3 of the Hague Convention. This provision is subject to the occupying power's duty, expressed in article 4(1) to assist in safeguarding and preserving cultural property, a provision wide enough to authorize the occupying power to conduct salvage excavations where an archaeological site is threatened with destruction by construction work. It is submitted that such an interpretation is more in keeping with the intentions of the drafters of the convention, who were against according far-reaching powers to a military occupant.

2.4.2 Mechanisms for the Execution of the Hague Convention of 1954

One of the innovations of the Hague Convention of 1954 is the introduction of an elaborate system of control to secure the protection of cultural property during armed conflict. These arrangements are contained in the Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (Regulations of 1954). The system is based on three elements; "Protecting Powers," representatives of parties to the conflict, and commissioners-general.

The role of the Protecting Powers is to represent the interests of the state to whom they are accredited. As Hanna Saba explains:

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[25] *Ibid.*

> The organization of the machinery for control and implementation takes account of international practice whereby, when two countries enter into war or simply break off diplomatic relations, they entrust a neutral State" a Protecting Power with the task of defending their interests in the country with which they are in conflict.[26]

The system for appointing Protecting Powers is not provided for in the convention. The appointment of Protecting Powers is regulated by the Geneva Conventions of 1949 and the Vienna Convention on Diplomatic Relations of 1961. According to article 5 of the Regulations, the role of delegates of the Protecting Powers is to take note of violations of the convention, investigate the circumstances in which they occurred, make local representations to secure their cessation, and to notify the commissioner-general of such violations.

Article 2(1) of the Regulations requires each party to the conflict to appoint a representative for cultural property situated in its territory. If a party occupies other territory, it must also appoint a special representative for cultural property situated in that territory. The representatives promote the interests of the party which appoints them to the commissioner-general, delegates of the Protecting Powers, and other relevant parties.

Article 2 of the Regulations requires that a commissioner-general for Cultural Property be appointed for each party involved in an armed conflict. The main responsibility of the commissioner-general is to ensure that the belligerents observe the convention. In contrast to the delegates of the Protecting Powers and the parties' representatives for cultural property, they play a neutral role. They are appointed from an international list, drawn up by UNESCO, of experts nominated by states parties. Their appointment requires the agreement of the state to which they will be accredited and the Protecting Powers. If Protecting Powers have not been appointed during the conflict, a neutral state can be asked to undertake the functions of a Protecting Power with regard to the appointment of any commissioner-general.[27]

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[26] Hanna Saba, "UNESCO and Human Rights," in Karel Vasak (ed.), *The International Dimensions of Human Rights*, Vol. II (Paris and Westport, CT: UNESCO and Greenwood Press, 1982) pp. 401, 405.

[27] Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict.

The mandate of the commissioner-general is closely defined by article 5. The commissioner-general is to deal with all matters referred to him/her in connection with the application of the convention, working with the representative of the party to which s/he is accredited and the delegates of the relevant Protecting Power. The commissioner-general has a passive role: s/he cannot take the initiative regarding violations of the convention, but can only act if a violation is referred to him/her. Subject to the approval of the party to whom s/he is accredited, the commissioner-general can order an investigation or conduct it him/herself. S/he is required to make representations to the parties to the conflict or to their Protecting Powers concerning the convention and to draw up reports on the convention's application, communicating them to the parties concerned and sending copies to the Director-General of UNESCO. In the absence of a Protecting Power, the commissioner-general also exercise the former's functions. Article 10 of the Regulations states that the remuneration and expenses of the commissioner-general, as well as inspectors and experts, shall be met by the party to which they are accredited. The financial dependence of the commissioners-general on states which they are required to monitor arguably limits their independence and freedom of action.

The system of control established by the Hague Convention of 1954 is complex and cumbersome. It has not worked successfully. Since the convention came into force, it has only proven possible to appoint commissioners-general in one armed conflict: the 1967 war between Israel and the Arab states. Through the use of special representatives, UNESCO arguably has proven somewhat more effective in intervening to ensure the protection of cultural property.

Article 23 of the Hague Convention of 1954 establishes a second more flexible mechanism of control by allowing the High Contracting Parties to call upon UNESCO for technical assistance in organizing the protection of cultural property or in connection with any other problem arising out of the application of the convention. UNESCO is required to provide assistance, subject to the limits of its program and resources. In contrast to the commissioner-general, UNESCO is explicitly authorized by the convention to make proposals about protection of cultural property on its own initiative.[9]

During armed conflicts UNESCO has concentrated its activities in three areas: securing respect for the Hague Convention; providing technical

assistance, and establishing the convention's control procedures.[28] Normally, following the outbreak of an armed conflict, UNESCO contacts the states involved, requests all belligerents to comply with their obligations under the Hague Convention of 1954, and places the organization's services at the disposal of the parties to the conflict. This is often followed by a meeting between the Director-General of UNESCO and the relevant ambassadors accredited to UNESCO.[29] On occasion, the Director-General will spend a special envoy to remind the parties to the conflict of their duties.

2.5 The Hague Protocol of 1954

The systematic pillage of cultural property perpetrated by Germany in the territories which it occupied during World War II prompted UNESCO to propose to the intergovernmental conference of 1954 the adoption of a special protocol attached to the treaty dealing with the question of removal of cultural property from occupied territory. Article 1(1) of the protocol requires states parties to prevent the exportation of cultural property from a territory which it occupies.[30] The scope of article 1(1) is wide, it aims to prevent any kind of exportation of cultural property, not only cultural property which has been stolen or pillaged.[31] It should be noted that article 1(1) makes it clear that this obligation arises simply as a result of the fact of occupation, regardless of whether another state party exercises sovereignty over the territory or not.[32]

The protocol also requires the restitution of cultural property removed from occupied territory. The question of restitution will be discussed below.

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28 Etienne Clément, "Some Recent Practical Experience in the Implementation of the 1954 Convention," *International Journal of Cultural Property*, Vol. 3 (1994) pp. 11, 16. Toman, *La protection des biens culturels*, p. 373.

29 *Ibid.* pp. 18-19.

30 The protocol also requires the return of cultural property removed from occupied territory. The question of restitution will be discussed below.

31 Thomas Fitschen, "Licit International Art Trade in Times of Armed Conflict?" International Journal of Cultural Property, Vol. 5 (1996) pp. 127-8.

32 Jiri Toman and Marion Haunton, "Peacekeeping, Occupation, and Cultural Property," University of British Columbia Law Review (Special Issue) (1995) pp. 216, 226.

2.6 Summary of International Standards on Treatment of Cultural Property during Armed Conflict

In summary it can be said that the international law of armed conflict places the following obligations and constraints on a military occupant in its treatment of cultural property in occupied territory:

- Pillage of cultural property is prohibited and must be prevented (Hague Regulations of 1907, article 47; Fourth Geneva Convention of 1949, article 33; Hague Convention of 1954, article 4(3)).
- Theft of cultural property by private individuals is prohibited and must be prevented (Hague Convention of 1954, article 4(3)).
- Property of institutions dedicated to religion, charity and education, the arts and sciences, even if state-owned property, is to be treated as private property (Hague Regulations of 1907, article 56).
- Seizure of institutions dedicated to religion, charity and education, the arts and sciences is prohibited (Hague Regulations of 1907, article 56).
- Destruction or damage of cultural property is prohibited (Hague Regulations of 1907, article 56; Fourth Geneva Convention of 1949, article 53; Hague Convention of 1954, article 4(3)).
- The conduct of excavations, with the exception of salvage excavations, is prohibited (Hague Regulations of 1907, article 56; Fourth Geneva Convention of 1949, article 53; Hague Convention of 1954, article 4(3)).
- States are prohibited from requisitioning movable cultural property (Hague Convention of 1954, article 4(3)).
- Reprisals against cultural property are prohibited (Hague Convention of 1954, article 4(3)).
- An occupying power must support the competent national authorities of occupied territory in safeguarding and preserving its cultural property (Hague Convention of 1954, article 5(2)).
- An occupying power must take measures to preserve cultural property damaged by military operations in close cooperation with the national authorities (Hague Convention of 1954, article 5(2)).
- An occupying power must prevent the export of cultural property from occupied territory (Hague Protocol of 1954, article 1).

2.7 International Council of Museum's Code of Professional Ethics of 1986

In reaction to widespread looting and illicit international traffic in cultural artifacts, non-governmental organizations have developed non-legal controls on this phenomenon to supplement the international legal standards. The normative content of these controls is generally based on the legal standards and they are designed to assist in their implementation.

The International Council of Museum's (ICOM) Code of Professional Ethics of 1986 is of particular significance since it attempts to halt to museums' involvement, whether direct or indirect, in illicit traffic in cultural property. ICOM was established in 1946 and 950 museums, including some of the world's most influential institutions, as well as 12,378 individuals, are ICOM members.[33] The objectives of ICOM are *inter alia* to encourage the establishment, development, and professional management of museums of all kinds, and to organize cooperation and mutual assistance between museums in different countries.[34]

The Code of Professional Ethics, adopted unanimously by ICOM's General Assembly in Argentina in 1986, is binding on all ICOM members.[35] Article 3(2) of the Code of Professional Ethics states:

> A museum should not acquire, whether by purchase, gift, bequest, or exchange any object unless the governing body and responsible officer are satisfied that the museum can acquire a valid title to the specimen or objects in question and that in particular it has not been acquired in, or exported from its country of origin and/or any intermediate country in which it may have been legally owned in violation of that country's laws.
>
> So far as excavated material is concerned, in addition to the safeguards set out above, the museum should not acquire by purchase objects in any case where the governing body or responsible officer has reasonable cause to believe that their recovery involved the recent

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[33] Letter to al-Haq from Valérie Jullien, ICOM Public Relations Officer, 18 December 1996.

[34] ICOM Statutes, article 3(1).

[35] Letter to al-Haq from Valérie Jullien, ICOM Public Relations Officer, 1 August 1996.

> unscientific or intentional destruction or damage of ancient monuments or archaeological sites, or involved a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities.

Article 3(2) also makes it clear that these principles should be applied, if appropriate and feasible, in determining whether to accept loans for exhibitions. Article 3(6) which deals specifically with the question of loans, states that the ethical principles outlined in article 3(2) must be applied when considering proposed loans.

In addition, article 4(4) of the Code of Ethics states:

> Museums should also respect fully the terms of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention, 1954), and in support of this Convention, should in particular abstain from purchasing or otherwise appropriating or acquiring cultural objects from any occupied country, as these will in most cases have been illegally exported or illicitly removed.

Although article 4(4) does not expressly require ICOM members to apply this standard in relation to exhibition loans, it is submitted that this is implicit in the general obligation placed on members to respect fully the Hague Convention of 1954.

3. THE APPLICATION OF THE INTERNATIONAL LAW OF CULTURAL PROPERTY TO THE ISRAELI-PALESTINIAN CONFLICT

3.1 Israel's Position on the Applicability of International Law

3.1.1 The Israeli Government

The Israeli government recognizes the applicability of the Hague Convention of 1954 and, presumably, its Protocol, to the OPT with the exception of East Jerusalem.[36] In a letter to al-Haq, a representative of the International Treaties Department of the Ministry of Foreign Affairs stated:

> Regarding your question whether Israel continues to regard the Hague Convention and Protocol of 1954 as being applicable to the Occupied Territories.... Israel has stated many times that it regards this convention as being applicable to the administered territories, and even isued [*sic*] a decree which instructed the military forces in the territories to act by the provisions of this Convention.[37]

The Israeli government does not recognize the *de jure* applicability of the Fourth Geneva Convention of 1949 to the OPT or at least regards its applicability to the OPT as being "doubtful".[38] The Israeli government claims, however, that it applies the humanitarian provisions of the convention in the OPT on a *de facto* basis.[39] Israel appears to believe that by accepting that the convention is applicable it will be recognizing the sovereignty of Jordan and Egypt over the West Bank and the Gaza Strip, respectively, and renouncing its own possible claims, not yet asserted, to sovereignty over

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36 In 1967 Israel annexed occupied East Jerusalem by extending its jurisdiction and the application of Israeli law to the area. Israel therefore does not recognize that any laws of belligerent occupation are applicable to East Jerusalem, even though it was occupied in 1967.

37 Letter to al-Haq from the Israeli Ministry of Foreign Affairs, Department of International Treaties, Jerusalem, 28 July 1995.

38 See Nissim Bar-Yaacov, "The Applicability of the Laws of War to Judea and Samaria (the West Bank) and to the Gaza Strip," Israel Law Review, Vol. 24 (1990) pp. 485-94.

39 Ibid. p. 486.

these areas.[40] The Israeli government's position has been consistently rejected by the international community, which has reaffirmed the *de jure* applicability of the Fourth Geneva Convention of 1949 in numerous UN Security Council and General Assembly Resolutions.[41]

Israel's divergent position on the applicability of the Hague Convention of 1954 and the Fourth Geneva Convention of 1949 is a little puzzling, since both treaties contain almost identical provisions on the circumstances of the treaties' application. If the Israeli government believes that its recognition of the Hague Convention of 1954 does not imply its recognition of Jordanian and Egyptian sovereignty in the OPT, it should be able to accept that recognition of the applicability of the Fourth Geneva Convention of 1949 does not imply such a recognition of sovereignty.

The Israeli government does not appear to have affirmed or denied the *de jure* applicability of the Hague Convention of 1907 and its Regulations.

3.1.2 The Israeli High Court of Justice

The Israeli High Court of Justice has accepted that the Hague Convention of 1954 is applicable to the OPT.[42] As an unincorporated treaty, the Hague Convention of 1954 cannot be regarded as part of the internal law of Israel. Rules of customary international law, in contrast to international treaties like the Hague Convention of 1954, are automatically incorporated into Israeli law unless they conflict with a law passed by the Knesset.[43] In *Khalil Iskandar Shahin Kandu v. Minister of Defense* the petitioner sought judicial review of a decision of the antiquities staff officer for the West Bank that construction on the petitioner's land would only be permitted if a Roman aqueduct was preserved. The Israeli High Court found that the officer was under an obligation under customary international law to safeguard and

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[40] Yahav (ed.), *Israel, the "Intifada" and the Rule of Law* (Israel: Israel Ministry of Defense Publications, 1993) p. 21.

[41] Adam Roberts, "International Law and the Administration of Occupied Territory," in Emma Playfair (ed.), *Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988* (Oxford: Oxford University Press, 1992) pp. 25, 52-3.

[42] *Muhammed Hussein Suleiman Shachrur v. The Military Commander of the Judea and Samaria Area*, H.C. Case No. 560/88. *Piskei Din*, Vol. 44, part ii, pp. 233-4.

[43] Ruth Lapidoth and Moshe Hirsch, "International Law: The Practice and Case Law of Israel in Matters Related to International Law. Part I. Cultural Property: Protection in Armed Conflict," *Israel Law Review*, Vol. 27 (1993) pp 515, 517-18.

preserve cultural treasures in occupied territory, including archaeological treasures.[44] The High Court's finding that customary international law requires Israel to preserve and safeguard cultural property is significant. The Israeli High Court has jurisdiction to review any alleged breach of Israel's obligation to safeguard and preserve cultural treasures since this is an obligation under customary international law and, therefore, part of the internal law of Israel.

The High Court also regards the Hague Regulations of 1907, universally accepted as customary international law, as part of Israeli domestic law and accepts the applicability of the Hague Regulations to the OPT.[45] However, the High Court does not apply the provisions of the Fourth Geneva Convention of 1949 in cases concerning the OPT on the basis that the Convention has not been incorporated into Israeli law.[46]

3.2 Measures to Secure the Implementation of International Law in Relation to Cultural Property in the Occupied Palestinian Territories

3.2.1 The Commissioners-General

As discussed earlier, the Hague Convention of 1954 establishes elaborate enforcement mechanisms. In fact, these mechanisms have only been activated on one occasion—following the Israeli-Arab war of 1967. After the outbreak of war in June 1967, the director-general of UNESCO invited the belligerents to put into effect the control mechanisms established by the Hague Convention of 1954 and its regulations.[47] Two commissioners-general were appointed: Professor H. Reinink was accredited to Israel and Professor Carl Brunner was accredited to Egypt, Jordan, Lebanon and Syria.[48]

Each commissioner-general took on the role of receiving allegations from the state(s) to which he was accredited about violations of the Hague

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[44] Khalil Iskandar Shahin Kandu v. Minister of Defense, H.C., Case No. 270/87. Piskei Din, Vol. 43, part ii, pp. 738, 742.

[45] Bar-Yaacov, "The Applicability of the Laws of War," p. 494.

[46] Ibid. p. 495.

[47] Saba, "UNESCO and Human Rights," p. 406.

[48] Clément, "Some Recent Practical Experience," pp. 19-20.

Convention and Protocol of 1954.[49] Each commissioner-general would then communicate these complaints to his counterpart who would investigate the allegations, and, if appropriate, make representations to the state(s) to whom he was accredited seeking respect for the convention.

Egypt and Jordan submitted most of the complaints focussing on Israel's conduct in the OPT, particularly East Jerusalem.[50] Objections were raised concerning Israel's seizure and destruction of cultural property, as well as Israel's carrying out of extensive archaeological excavations.

The commissioners-general were a source of accurate and reliable information about violations of the Hague Convention and Protocol of 1954 in the OPT. The information generated by the commissioners-general was used by the various organs of UNESCO—the director-general, the executive board and the general conference—as a basis for their activities to ensure protection of cultural property. However, the commissioners-generals' success in achieving increased respect for the convention's provisions by Israel was limited.

In 1977, both commissioners-general resigned.[51] The mechanism for choosing their successors became deadlocked. Switzerland, the state chosen to perform the role of Protecting Power for the purpose of negotiating the new appointments, mediated between Israel and the Arab states. All parties managed to agree on the choice of a Swiss national to be the commissioner-general accredited to Israel. It was not, however, possible to obtain the agreement of all parties on the choice of the commissioner-general accredited to the Arab states. Since 1977 there have been no commissioners-general operating in Israel, the OPT, and the Arab states.

3.2.2 UNESCO

The question of protection of cultural property by Israel in the OPT has been considered regularly by UNESCO's executive board and general conference beginning in 1967. Both organs have adopted numerous resolutions criticizing Israel for its failure to comply with the Hague Convention of 1954 and the UNESCO Recommendation on International Principles Applicable to

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[49] Saba, "UNESCO and Human Rights," pp. 408-9.

[50] *Ibid.* p. 409.

[51] Clément, "Some Recent Practical Experience," pp. 19-20.

Archaeological Excavations of 1986. In 1974 the general conference went as far as to recommend to the director-general that he withhold assistance from Israel in the field of education, science, and culture until it respected UNESCO resolutions.[52]

UNESCO's attention has been focused almost exclusively on the question of Jerusalem. Due to Israel's non-compliance with the resolutions of the executive board and the general conference in relation to Jerusalem, in 1972 the general conference invited the director-general to establish an effective presence in Jerusalem in order to secure the implementation of UNESCO resolutions.[53] In 1973 Professor Raymond Lemaire, a Belgian specialist in architectural restoration, was appointed as the director-general of UNESCO's Special Representative on Jerusalem for this purpose.[54] Since 1973 Professor Lemaire has traveled regularly to Jerusalem to discuss the situation with Israelis and Palestinians in Jerusalem. His reports, which contain detailed information about the state of protection of cultural property in Jerusalem, are submitted to the executive board and the general conference of UNESCO, which use them as a basis for their resolutions. Professor Lemaire has also produced a large number of reports on the state of the cultural and religious heritage of Jerusalem and on means to ensure its preservation and restoration.[55] In October 1987, UNESCO launched an appeal to the international community for the safeguarding of cultural heritage, particularly the Islamic monuments in the city of Jerusalem.[56] UNESCO established a special fund to finance the restoration of monuments in the Old City of Jerusalem and contributions from this fund have been used to renovate a number of buildings in Jerusalem.

Comparing the roles of the commissioners-general and the special representative for Jerusalem, Etienne Clément comments:

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[52] UNESCO General Conference Resolution. UNESCO Ref. No. 18C/3.427.

[53] UNESCO General Conference Resolution. UNESCO Ref. No. 17C/3.422.

[54] Report of the UNESCO Director-General to the UNESCO Executive Board. UNESCO Ref. No. 93 EX/17 Add. 1 Rev., p. 2.

[55] Report of the Director-General of UNESCO's Special Representative on Jerusalem. UNESCO Ref. No. 135 EX/11, p. 7.

[56] Report of the Director-General of UNESCO's Special Representative on Jerusalem. UNESCO Ref. No. 130 EX/12, p.2.

> This example [of the Special Representative] shows that practical results such as safeguarding operations in an occupied territory have been made possible by a more flexible method than the heavy control procedure set up by the Convention.[57]

It is clear that the Special Representative has helped to achieve concrete results with regard to the conservation of monuments in East Jerusalem, but there are many issues, relating to protection of cultural property in the OPT, which the special representative could not take up due to limitations on his mandate. The absence of the commissioners-general, who were empowered to address these issues, therefore remains problematic. The special representative has not been able to reverse Israeli policies which directly contravene the Hague Convention of 1954 and UNESCO resolutions. This is partly because of the special representative's particular role, which is to observe and report on the situation in Jerusalem and to make recommendations for technical assistance, in contrast to the role of the commissioners-general, which was to gather information and to make representations to the Israeli or Arab governments to seek an end to violations of the Hague Convention and Protocol of 1954. Another problem is the geographical limitations on the mandate of the special representative, whose activities are confined to Jerusalem. He has, therefore, been prevented from dealing with the many other violations of the international law of cultural property perpetrated by Israel elsewhere in the OPT. Additionally, the special representative's role has been almost exclusively confined to monitoring the state of immovable cultural property, even though Israel has seized large amounts of movable property in Jerusalem and elsewhere in violation of the Hague Convention and Protocol of 1954.

[57] Clément, "Some Recent Practical Experience," p. 20.

4. DOMESTIC LEGISLATION APPLICABLE IN THE OCCUPIED PALESTINIAN TERRITORIES

The basis of all domestic legislation concerning protection of cultural property in OPT is the Antiquities Ordinance of 1929, introduced by the British Mandate Authority for Palestine. The British government was in fact required by article 21 of the terms of the British Mandate for Palestine, set down by the Council of the League of Nations, to enact a law on antiquities ensuring non-discrimination in relation to excavations and archaeological research to citizens of all members of the League of Nations.[58]

The objective of the legislation which applies in the Gaza Strip, East Jerusalem and the remaining part of the West Bank is the protection of "antiquities", specifically, as opposed to cultural property in general. There is automatic protection for any movable or immovable object dating from before 1700 CE, for zoological remains dating back to before 600 CE, in the case of the West Bank excluding East Jerusalem and the Gaza Strip; and for zoological and botanical remains dating to before 1300 CE in the case of East Jerusalem where Israeli law is illegally applied.

Any object of a later date only receives protection as an antiquity if a government official declares it an antiquity. Under the law applicable in the Gaza Strip, the relevant official may only declare a piece of immovable property an antiquity. In East Jerusalem and the rest of the West Bank items of movable property which do not enjoy automatic protection can also be declared antiquities, although in East Jerusalem the object must be of historical value. These laws leave a great deal of significant cultural property without any kind of legal protection.

4.1 The Gaza Strip

The Antiquities Ordinance of 1929 remains in force in the Gaza Strip, although it has been amended by one Israeli military order. For the purposes of the ordinance, an antiquity is defined as any movable or immovable object produced or modified by human agency earlier than 1700 CE; human and animal remains dating back to before 600 CE; or any building or construction

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58 Lyndel Prott and Patrick O'Keefe, *Discovery and Excavation* Vol. 1 of *Law and the Cultural Heritage* (Abingdon: Professional Books, 1984) pp. 48-9.

of a date later than 1700 CE which the director of the Department of Antiquities may declare to be an antiquity.[59]

The ordinance requires any person without an excavation license who discovers an antiquity to report his/her discovery to the Department of Antiquities or other specified government officials.[60] The ordinance empowers a "High Commissioner" to acquire on behalf of the government any antiquity which is discovered in this way, subject to the payment of appropriate compensation to the finder.[61]

Excavations and other searches for antiquities are prohibited unless a license has been obtained from the high commissioner.[62] Licenses may only be granted to persons with proven scientific competence and who are prepared to expend sufficient money on the excavations to secure a satisfactory result on archaeological grounds. The ordinance explicitly prohibits discrimination on grounds of nationality or religion in the conferment of excavation licenses.[63] The high commissioner may compulsorily expropriate or lease private land which is the subject of an excavation license, if the landowner has unreasonably refused to allow a licensee to excavate on the land.[64] The granting of all licenses is made subject to certain standard conditions, including requirements to preserve antiquities which are discovered; to submit information concerning the conduct of the excavations; and to produce an adequate scientific publication of the results of excavations within two years of their completion.[65] If any of the conditions are breached, the director of the Department of Antiquities can suspend or cancel the license.[66] The ordinance provides for division of discovered antiquities upon completion of an excavation. The director of the Department of Antiquities is required to acquire all antiquities which s/he regards as indispensable for the

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59 Antiquities Ordinance 1929, section 2.

60 *Ibid.* section 3.

61 *Ibid.* sections 4 and 5. The powers of the high commissioner are currently exercised in the Gaza Strip by the Palestinian National Authority and the Military Commander of the Gaza Strip in their respective areas of jurisdiction. See Israel Defense Forces Proclamation No. 2 of 8 June 1967, Proclamation No. 4 of 17 May 1994, and Proclamation No. 5 of 11 October 1996.

62 *Ibid.* section 6.

63 *Ibid.* section 7.

64 *Ibid.* section 10.

65 *Ibid.* section 8.

66 *Ibid.* section 9.

scientific completeness of the Palestine Archaeological Museum or for the purpose of illustrating the history or art of Palestine.[67] The director must attempt subsequently to divide the remaining antiquities between the licensee and the high commissioner.

Trade in antiquities is made illegal unless the dealer obtains a license from the director.[68] The export of antiquities without a license is also prohibited. The director is entitled to prohibit the export of any antiquity the retention of which s/he considers to be in the public interest.[69]

Provision is also made for the director to designate certain areas as historical monuments and historical sites.[70] Certain types of activities, such as excavation, construction, and alterations are restricted in these designated areas.[71] The director is entitled to purchase or lease such an area compulsorily, subject to payment of appropriate compensation.[72]

The ordinance creates nine penal offenses, criminalizing *inter alia* failure to report a discovered antiquity; unlicensed excavation or export of antiquities; and intentional or negligent damage to or destruction of an antiquity. These offenses are punishable by a fine, and, in certain cases, also imprisonment.[73]

In 1973 the Israeli occupation authorities in the Gaza Strip introduced Military Order no. 462 concerning amendment of the Antiquities Ordinance of 1929. The order forbids the sale or transfer of any antiquity to a person who does not reside in the area, *i.e.* in the Gaza Strip, without permission from the director. Permission may be granted in respect of a particular object or a particular type of antiquity.[74] A new criminal offense is created for violation of this provision. The military order also requires antiquities merchants to keep an assets register and creates an offense for the failure to do this.

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[67] *Ibid.* section 11.

[68] *Ibid.* section 25.

[69] *Ibid.* sections 12 and 16.

[70] *Ibid.* section 17.

[71] *Ibid.* section 18.

[72] *Ibid.* section 19.

[73] *Ibid.* section 22.

[74] Military Order No. 462 concerning the Amendment of the Antiquities Ordinance of 20 April 1973, article 1.

4.2 The West Bank excluding East Jerusalem

In 1966 Jordan repealed the Antiquities Ordinance of 1929 and introduced Temporary Law Number 51 on Antiquities. This statute remains in force in the West Bank, although it has been amended by various military orders. The new law is largely similar to the ordinance and therefore only the innovative provisions will be discussed herein.

The definition of antiquities is similar to the ordinance, although the law empowers the minister to declare any movable or immovable object dating from after 1700 CE an antiquity.[75] Under the Antiquities Ordinance only items of *immovable* property of a date after 1700 CE could be declared to be antiquities.

The law creates a Department of Antiquities which has general responsibility for developing and implementing the state's archaeological policy, and an advisory council which serves as a consultative body to the department on any matters of significance related to archaeology.[76]

The provisions concerning ownership of the antiquities are very similar to those contained in the ordinance, although the law declares that antiquities are considered property of the state.

The standard conditions imposed on holders of excavation licenses are relatively similar to those set down in the ordinance. The ordinance's requirement of non-discrimination in the conferment of licenses, however, has been repealed. In addition to proving that s/he is scientifically competent, an applicant for an excavation license must demonstrate that the proposed director of excavations is specialized and has excavation experience.[77] Applicants for permits must present a financial guarantee of 1,000 -5,000 JD to guarantee the publication of a complete scientific document on the results of the excavations.[78] The director of the Department of Antiquities is required to appoint a representative to be present at the excavations.[79] All discoveries are placed under this representative's supervision.

The provisions of the law concerning export of and dealing in antiquities are

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[75] Law on Antiquities of 1966, article 2(c).

[76] *Ibid.* articles 3 and 4.

[77] *Ibid.* article 20.

[78] *Ibid.* article 21(a).

[79] *Ibid.* article 25(g).

almost identical to those contained in the Antiquities Ordinance of 1929.

The law creates penal offenses punishable by fines or imprisonment which are far heavier than those prescribed in the Antiquities Ordinance of 1929.[80]

In 1986 the Israeli occupation authorities introduced Military Order no. 1166 concerning Antiquities to the West Bank, excluding East Jerusalem. This military order amends the Jordanian Temporary Law on Antiquities of 1966 and repeals all amendments to this law contained in previous military orders.[81] The order authorizes the antiquities staff officer for the West Bank to exercise most of the powers contained in the Jordanian law. He is also given powers to arrest, confiscate materials, search individuals etc. under Military Order no. 378 concerning Security Provisions of 1970 regarding any contravention of the law.[82]

The military order makes the requirement for a financial surety to guarantee the publication of the results of the excavations and the requirement of the presence of a governmental representative at the excavations subject to the discretion of the antiquities staff officer.[83] Under the Jordanian law both these requirements were mandatory.

The military order amends the provisions concerning export of antiquities, prohibiting any person from exporting any antiquity from the region, *i.e.* the West Bank, excluding East Jerusalem, without a license or a general permit from the antiquities staff officer.[84] The order also introduces new safeguards for purchasers of antiquities by stipulating that no person may sell any copy or imitation of an antiquity or an antiquity composed of parts from different antiquities unless s/he indicates this.[85] Penalties for certain offenses are increased by the Order.[86]

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[80] *Ibid.* articles 46 and 47.

[81] Military Order No. 1166 concerning Antiquities of 1 May 1986, article 18.

[82] *Ibid.* article 16.

[83] *Ibid.* articles 4 and 6.

[84] *Ibid.* article 7.

[85] *Ibid.* article 10.

[86] *Ibid.* article 14.

4.3 East Jerusalem

Israel illegally applies Israeli law to occupied East Jerusalem as result of its extension of Israeli jurisdiction to East Jerusalem in 1967. Until 1978 the Antiquities Ordinance of 1929 remained in force in Israel. In that year the ordinance was repealed and the Antiquities Law was introduced. This statute now applies *de facto* in East Jerusalem. The new law contains a number of similarities with the ordinance and therefore only the innovative provisions will be discussed.

Until 1990 the Department of Antiquities of the Ministry of Education and Culture was generally responsible for antiquities and for the implementation of the 1978 law in Israel and in East Jerusalem. In April 1990 the Israeli Antiquities Authority (IAA), a body which is independent of the Israeli government, took over the role of the Department of Antiquities.[87]

The definition of antiquities is broader than the ordinance's definition. An antiquity includes zoological and botanical remains from before the year 1300 CE rather than 600 CE.[88] The ordinance only protected zoological remains. The definition also includes any movable or immovable object, which is of historical value and which the Minister of Education and Culture declares to be an antiquity. Under the ordinance no item of movable property dating from after 600 CE could be declared to be an antiquity. The law introduces state ownership of discovered antiquities. Where an antiquity is discovered, it and the area in which it is discovered, becomes the property of the state, although the director of the IAA can waive state ownership.[89] If a person carrying out works on a site discovers an antiquity, s/he is required not only to notify the but also to discontinue the works. The director must inform such a person within 15 days whether the works can be continued and, if so, under what conditions.[90] A person adversely affected as a result of notification is entitled to compensation.[91]

The standard conditions imposed on holders of excavation licenses are similar to those set down in the ordinance. The ordinance's requirement of non-discrimination in the conferment of licenses, however, has been repealed.

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87 Deena Rosenfeld, "New Antiquities Authority Takes on Entrepreneurial Cast," *The Jerusalem Post*, 4 December 1990, p. 6.

88 Antiquities Law, 1978, section 1.

89 *Ibid.* sections 2 and 8.

90 *Ibid.* section 6.

91 *Ibid.* section 7.

The 1978 law contains new provisions on excavation reports. The licensee is required to submit as detailed a report as possible of the excavation at least once a year from the date of the commencement of the excavation. The licensee must also produce an appropriate scientific publication on the finds and results of the excavation within five years of the excavation's termination.[92]

Provisions regarding licensing and control of antiquities dealers have been strengthened.[93] New rules have also been introduced regarding collectors of antiquities and museums. If a collector wishes to dispose of an item which has been designated a "special antiquity" by the director, or if a museum wishes to dispose of any antiquity, they are required to give advance notice to the director, who may request that the item be sold to the state.[94]

The law creates penal offenses punishable by fines or terms of imprisonment which are far heavier than those prescribed in the ordinance.[95]

4.4 Analysis of Israeli Amendments to Domestic Legislation

According to article 43 of the Hague Regulations of 1907, the occupying power is under a duty to take all measures in its power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. The obligation to restore and ensure public order and safety has a broad meaning, encompassing all aspects of civil life, including the duty to ensure protection of cultural property. The occupying power is under an obligation to retain the law in force on the eve of occupation unless absolutely prevented. If it is imperative that domestic law be amended, this should either be in order to meet the legitimate security interests of the occupying power, to benefit the inhabitants of the occupied territory, or to fulfill the occupant's obligations under international law.

The application of Israeli antiquities laws to East Jerusalem as a result of Israel's annexation of this area is clearly in complete violation of article 43. A number of the amendments through military orders to the applicable local law in the West Bank and Gaza Strip also contravene article 43 either because such amendments were not essential, or because they contradict

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[92] *Ibid.* section 12.

[93] *Ibid.* sections 15-21.

[94] *Ibid.* section 23-5.

[95] *Ibid.* sections 37 and 38.

Israel's obligations under international law and/or do not benefit the population of the West Bank and the Gaza Strip.

Military Orders Nos. 1166 of 1986 for the West Bank and No. 462 of 1973 for the Gaza Strip introduce amendments which contemplate the export of antiquities from each of these areas if a permit has been obtained from the Israeli occupation authorities. The provisions do not specify the grounds on which a permit may be granted. The legality of these amendments is questionable since they appear to contravene international law: the export of cultural property from occupied territory except for the purpose of securing its protection is absolutely prohibited by the Hague Protocol of 1954.

Controls on export of antiquities are actually weakened by the amendments. In both the West Bank and the Gaza Strip the local law in force in 1967 required that a separate permit be obtained for the export of each single item of cultural property. By contrast, the military orders weaken these provisions by authorizing the grant of permits for the export of classes of objects. Military Order No. 1166 abolishes the mandatory requirement for payment of a surety to in order to guarantee publication of the results of an excavation and for the attendance of a governmental representative at excavations, making these issues a matter for the discretion of the antiquities staff officers. All these amendments contravene article 43, as it cannot be in the interests of the local population that legal safeguards to protect cultural property contained in local law are diluted by military orders.

4.5 The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip

In the last two years there has been a phased transfer of responsibility for archaeology from Israel's Civil Administration in the OPT to the PNA in areas under the latter's territorial jurisdiction as a result of the signing of the DOP, the Agreement on the Gaza Strip and Jericho Area, and the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II Agreement) by Israel and the PLO.[96] Although these agreements are not strictly part of the internal domestic law of the OPT, they are of enormous significance for the administration of the OPT and also have a serious impact on cultural issues. Relevant provisions will therefore be discussed here.

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96 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Washington DC) 28 September 1995. This agreement supersedes the Agreement on the Gaza Strip and Jericho Area which was signed in Cairo on May 1994. The latter's provisions concerning archaeology will not be discussed here.

The hand-over of powers in relation to archaeology is regulated by article 2 of Appendix 1 of the Protocol concerning Civil Affairs attached to the Oslo II Agreement. A joint committee of experts is established by article 2(4) to deal with archaeological issues of common interest. It should be noted that the transfer of powers concerning archaeology is limited to the areas under territorial jurisdiction of the PNA. The PNA controls only about 30 percent of the entire territory of the West Bank, excluding East Jerusalem, and 60-65 percent of the Gaza Strip.[97] Israel, therefore, retains wide powers in relation to the administration of cultural property in the OPT.

Article 2(3) places the Palestinian side under an obligation to protect and safeguard sites and to prevent damage to them. No similar obligation is placed on the Israeli side. Article 2(5-6) require the PNA to respect academic freedom and to grant excavation licenses to archaeologists on a non-discriminatory basis. Again, the Oslo II Agreement does not impose a reciprocal obligation on the Israeli side. Both sides are required, however, to inform each other of the discovery of any new archaeological sites.

According to article 2(7), the PNA must also ensure free access to archaeological sites which are open to the public without discrimination. Both sides undertake in article 2(9) to respect sites in the OPT which are regarded as holy or which hold archaeological value and each side can raise concerns relating to these sites before the joint committee of experts. Twelve sites deemed to be of archaeological and historical importance to the Israeli side are listed and mainly comprise synagogues or Jewish holy sites. There is no equivalent list of sites which are to be regarded as being of similar importance to the Palestinian side. Actions taken by the PNA concerning these listed sites must be referred to the joint committee for full cooperation.

Article 2(10) defers discussion of the Palestinian claim for the return of all archaeological artifacts discovered in the West Bank since 1967 to the final status negotiations. In the meantime, however, Israel is placed under a duty to provide the Palestinian side with all archaeological records for sites under PNA territorial jurisdiction, including a list of all excavated sites, as well as a detailed list and description of artifacts found in such sites since 1967. The obligation is limited since it only applies to sites where the PNA now exercises territorial jurisdiction, and a significant number of sites in the OPT are excluded.

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[97] David Makovsky, "Inside Look at What Oslo 2 Says," *The Jerusalem Post*, 8 October 1995, p. 3, and Jon Immanuel, "Israeli, PLO Security Officials Meet in Gaza," *The Jerusalem Post*, 6 May 1994, p. 1.

Both sides undertake to take steps to prevent theft, to enforce prohibitions on illegal trading, and to prevent transfers from the West Bank and Gaza Strip to Israel or abroad. This is a significant commitment by Israel, which, in breach of its obligations under the Hague Protocol of 1954, has removed many items of cultural property from the OPT since 1967.[98]

The Oslo II Agreement provides some positive provisions which may assist in an improved implementation of the international law of cultural property in the OPT. The transfer of information on archaeological excavations conducted in areas under PNA jurisdiction will be of great assistance in pursuing Palestinian claims for the return of cultural artifacts removed from the OPT since 1967. The requirement imposed on Israel and the PNA to refrain from exporting artifacts from the OPT, if respected, will greatly assist in implementing the Hague Protocol of 1954.

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[98] See section 5.2.

5. ISRAELI VIOLATIONS OF THE INTERNATIONAL LAW OF CULTURAL PROPERTY IN THE OCCUPIED PALESTINIAN TERRITORIES

5.1 Israeli Excavations in the Occupied Palestinian Territories

The Hague Convention of 1954 generally prohibits an occupying power from carrying out excavations in occupied territory and from issuing excavation licenses to institutions. Salvage excavations to gather information and save artifacts prior to construction work are, however, legal because they serve an overriding public interest. Israel does not accept this view of international law and has adopted the position that international law does not forbid excavations in occupied territory.[99]

Since 1967 Israel has conducted or authorized hundreds of excavations in the OPT. A significant number of these excavations were illegal under international law because they were not salvage excavations.[100] According to Dr. Mo'in Saadeq, Director of Archaeology in the Gaza Strip for the PNA, 55 excavations were conducted in the Gaza Strip alone between 1967 and 1993. The exact number of excavations carried out in the West Bank is unknown but runs into the hundreds.[101]

As discussed above, Israeli military orders vest responsibility for archaeology in the hands of two Israeli "antiquities staff officers", one for the West Bank, excluding East Jerusalem, and one for the Gaza Strip. Until 1990 the Israeli Ministry of Education and Culture Department of Antiquities exercised responsibility for archaeology in East Jerusalem as a result of Israel's illegal annexation of this area. The IAA assumed these responsibilities in 1990.

The staff officers and the IAA exercise responsibility for issuing excavation

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[99] See section 2.4.1.

[100] For the purposes of this study we adopt the definition of excavations contained in article 1 of the UNESCO Recommendation concerning International Principles Applicable to Archaeological Excavations of 1956, which states: "For the purposes of the present Recommendation, by archaeological excavations is meant any research aimed at the discovery of objects of archaeological character, whether such research involves digging of the ground or systematic exploration of its surface or is carried out on the bed on the sub-soil or inland or territorial waters of a Member State."

[101] According to the Israeli Civil Administration's Annual Report for 1984, 37 excavation licenses were granted between 1 April 1984 and 31 March 1985 and 30 excavations were actually conducted, of which 5 were surveys and 18 were salvage excavations. According to the annual report for 1985, 11 licenses were granted between 1 April 1985 and 31 March 1986, 2 of which were for new excavations. In addition, 7 salvage excavations were carried out by the Officers for Archaeology in the West Bank and the Gaza Strip. Other annual reports of the Civil Administration have not been made available to the public.

licenses. Since 1967 virtually all licenses have been granted to Israeli institutions, principally the archaeology departments of various Israeli universities including Tel Aviv University, Hebrew University, Haifa University, and Bar-Ilan University. Foreign archaeological institutions have generally adhered to international law and the UNESCO Recommendation of 1956, by refraining from applying to the Israeli authorities for excavation licenses. The principle foreign schools of archaeology in Jerusalem (British School of Archaeology, French Ecole Biblique, US Albright Institute, and German Protestant Institute of Archaeology) did not excavate in the OPT after 1967 until the hand-over of responsibility for archaeology in parts of the West Bank and the Gaza Strip to the PNA in 1993. [102] Since then the British School and the Ecole Biblique have received licenses from the PNA for excavations in areas under PNA jurisdiction. The Albright Institute and the British School of Archaeology both cite UNESCO's 1956 Recommendations on International Principles Applicable to Archaeological Excavations, which generally prohibit excavations in occupied territory, as the basis for not seeking excavation licenses from the Israeli authorities. The British School and the Ecole Biblique stated that they follow the directives of their respective governments on this matter. The British government relies on the Recommendation of 1956 to justify its position.[103]

Many Israeli excavations in the OPT fall into the category of what Professor Lemaire, the Director-General's Special Representative for Jerusalem, describes as "research decided on for no purpose other than to study the "archives of the soil" in order to extend knowledge about the past of the area.[104] For the reasons discussed earlier, international law makes this type of excavation illegal.

The Israeli authorities have persistently defied the law and conducted such excavations in the OPT. Perhaps the most dramatic example of this defiance is provided by the excavations carried out along the southern and southwestern wall of the Haram al-Sharif in Jerusalem between 1968 and 1977 under the direction of Professor Benjamin Mazar and later Professor

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[102] The British School of Archaeology conducted excavations in the West Bank in 1967 under the authority of a license issued by the Jordanian Department of Antiquities.

[103] Telephone interviews with John Woodhead, Assistant Director of the British School of Archaeology on 28 May 1996; Sy Gitin, Director of the Albright Institute on 29 May 1996; Dr. Volkmar Fritz, Director of the German Protestant Institute of Archaeology on 30 May 1996; Father Michel Sigrist, Director of the Ecole Biblique on 30 May 1996, and Ya'coub Dahdal, Commercial Section Officer at the British Consulate in East Jerusalem in September 1996.

[104] UNESCO Ref. No. 135 EX/11, p. 12, para. 14.5.

Meir Ben-Dov. This excavation was prompted by intense Israeli interest in finding archaeological evidence of the Herodian Temple which the excavators believed to be located on the actual site of the Haram al-Sharif compound. Other examples of illegal excavations of this nature are discussed in the case studies below.

Although salvage excavations are generally permissible in international law, the legality of certain salvage excavations in the OPT is dubious, because of their association with the construction of Israeli settlements, which are themselves illegal in international law.[105] For example, the building of the settlements of Pisgat Ze'ev, Shu'fat Ridge and Ramot, all in East Jerusalem; Karnei Shomron, in Qalqilya district; and Tel al-Rumeida, Hebron district, all required salvage excavations.[106] Excavations on a massive scale, which produced very important discoveries, such as the Cardo, one of the main paved streets of Roman Jerusalem, and the Nea, a massive Byzantine Church, were required before the reconstruction and extensive expansion of the "Jewish Quarter" in the Old City of Jerusalem.[107] The expansion of the settlement of Ma'aleh Adumim necessitated excavations which were described by Israel's Civil Administration in the West Bank as "one of the largest projects undertaken in Judea and Samaria specifically, and in Israel [*sic*] in general."[108]

Similarly salvage works necessitated by the building of roads for use by the residents of Jewish settlements in the OPT are of doubtful legality because these settlements are themselves illegal under international law. The construction of settlement bypass road, Route Number 60, resulted in salvage excavations being carried out at Khirbet Abu-Dweir, an important archaeological site covering about 20 dunums located between Sa'ir and Halhoul in Hebron district. This site contains features dating from the Byzantine, Roman, and Ayyoubid eras. Excavations were begun by the Israel's Civil Administration's antiquities department in October 1995. Large amounts of pottery were found at the site and removed by the employees of

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105 Fourth Geneva Convention of 1949, article 49: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

106 Reports of the Director-General of UNESCO's Special Representative on Jerusalem. UNESCO Ref. No. 137 EX/26, p. 4, para. 3.2; UNESCO Ref. No. 140 EX/12, p. 4, para. 3.2; and Civil Administration, *Annual Report for 1984* (Beit El: Civil Administration, 1985) p. 85.

107 Mahmoud al-Hawari, "Jérusalem; l'archéologie dévoyée," *Revue d'Etudes Palestiniennes* No. 51 (1994), pp. 104, 112-13.

108 See Yitzhak Magen, *The Monastery of Martyrius at Ma'ale Adummim* (Jerusalem: Israel Antiquities Authority, 1993).

the antiquities staff officer for the West Bank. In June 1996 Roman and Byzantine remains were discovered during the construction of a settlement road north of Bethlehem, near Jabal Abu-Ghneim.[109] Salvage excavations were conducted by the Israeli authorities.

The Israeli authorities have attempted to justify other excavations in the OPT by arguing that if excavations are not conducted sites will be destroyed by the looting of antiquities thieves making excavation impossible.[110] The problem of antiquities theft in the OPT is undeniably a serious one. Israel is under an explicit duty under the Hague Convention of 1954 to protect sites from theft and vandalism. Israel's failure to take sufficient and appropriate action to protect archaeological sites cannot be used as a pretext for carrying out excavations.

Various negative consequences for the Palestinian heritage in the OPT have resulted from the excavations which have taken place since 1967. The excavation of hundreds of sites in the OPT since 1967 has deprived Palestinians in the OPT of the opportunity to explore these sites in a manner which they consider appropriate. Thousands of archaeological artifacts have been discovered in the course of these excavations and most have been removed from the OPT or have been placed in the custody of the Israel authorities. This material is therefore not accessible to Palestinian archaeologists or the general public. In addition, vast amounts of information about the material heritage of Palestine, derived from these excavations, remains in the hands of the Israeli authorities and Israeli academic institutions. A great deal of this information is not in the public domain and Palestinians from the OPT do not have access to it.

As a result of 30 years of occupation, many Palestinians in the OPT have been alienated from the material cultural heritage which surrounded them.[111] A government's powers to expropriate land on which an archaeological site is located or to acquire for the nation objects of historical significance are generally accepted as being necessary for the general public good. When a government is seen to exploit these powers for some other objective, resentment soon develops. Many Palestinians perceive that the Israeli

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109 "Israeli Workers Seize Historical Artifacts in Bethlehem," *al-Nahar*, 20 June 1996, p. 5 (Arabic); and Siham Khouri, "Jabal Abu-Ghneim Bypass Road Will Serve Settlements and Destroy Archaeological Features," *al-Nahar*, 20 June 1996, p. 5 (Arabic).

110 Interview with Dr. Nazmi al-Jubeh of Department of History, Birzeit University, on 13 January 1996, and statement of IAA spokesperson Efrat Orbach as reprinted in Lapidoth and Hirsch, "International Law" p. 520.

111 Albert Glock, "Archaeology as Cultural Survival: The Future of the Palestinian Past," *Journal of Palestine Studies*, Vol. XXIII (Spring 1994) pp. 70, 78-9.

occupant has abused its powers under the antiquities laws to pursue its own national objectives rather than the interests of the Palestinians in the OPT. As a result they have refused to report discoveries of archaeological sites or antiquities to the Israeli authorities. This may be considered an exacerbating factor in problems relating to illegal digging and theft. This sense of alienation will not disappear automatically with the emergence of the PNA and it may take years for attitudes to alter.

5.1.1 Case Study: Digging in the Tunnel Running North of the Western Wall of the Haram al-Sharif

In 1968 Israel's Ministry of Religious Affairs initiated the digging of a tunnel north of the western wall of the Haram al-Sharif under the buildings which line the western edge of the Haram. The director-general of UNESCO's Personal Representative describes the tunnel as a gallery averaging one to two meters in width and three to four meters in height and at an average depth of eight to nine meters below ground level.[112] Work on the "Western Wall Tunnel", as it has been named by Israel, had continued intermittently until the present day. Initially the tunneling proceeded in secret. The digging infringed the rights of the Islamic Waqf, which holds the legal title to most of the area including the sub-soil in question, since the Waqf's consent was not obtained. The main purpose of the digging was to expose masonry which is thought to be part of the Herodian Temple. These works cannot, however, be regarded as professional archaeological excavations since the works generally were not supervised by professional archaeologists and did not follow scientific excavation methods.[113]

Professor Raymond Lemaire, the director-general's Representative, has stated that the only justification for these activities was on "religious grounds."[114] Professor Lemaire has criticized the failure of the Israeli Ministry of Religious Affairs to involve archaeologists in these works on several occasions, stating:

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[112] Report of the Director-General of UNESCO's Special Representative on Jerusalem. UNESCO Ref. No. 127 EX/12, p. 17, para. 8.

[113] The digging of the tunnel also caused extensive damage to a number of Mamluk religious buildings whic line the western wall of the Haram al-Sharif. This is discussed in section 5.5.2.

[114] *Ibid.* p. 18, para. 8.

> It is regrettable that the tunneling, which constitutes an excavation in the deep subsoil of Jerusalem, has not been monitored by an experienced archaeologist. While not directing the work, which is in principle regrettable, can only be condemned, he could have been responsible for recording in scholarly fashion the archaeological information yielded by the subsoil. Now that the archaeological remains exposed by the digging have been covered for ever by concrete reinforcements, whole pages of the ancient history of Jerusalem may be lost for all time.[115]

Between 1968 and early 1970 work on the tunnel by the Ministry of Religious Affairs proceeded in violation of Israel's own laws. According to section 18 of the Antiquities Ordinance of 1929, certain types of activities, such as excavation, are prohibited in registered historical sites without a permit from the Department of Antiquities. The entire Old City of Jerusalem has been a registered historical site since the British Mandate period.[116] The Ministry of Religious Affairs, however, only received a permit for this work from Israel's Department of Antiquities on 1 January 1970.[117]

The tunneling was extremely controversial locally and internationally, not only because it was carried out without the consent of the Islamic Waqf and other legal owners of the property, but also because it has caused soil movement which has damaged a number of historic Mamluk buildings which lie above the tunnel and run along the edge of the Haram al-Sharif.[118] In an interview, Zvi Greenhut of the IAA agreed that there had been "a lot of problems" with the digging of the tunnel.[119] There has also been concern at such radical change to the status quo in the an area adjacent to the Haram al-Sharif and that the tunnel might allow unauthorized access to the Haram al-Sharif. On the domestic level, over the years the works have not only attracted criticism by Palestinian institutions, but also by the Israeli-run

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115 Report of the Director-General of UNESCO's Special Representative on Jerusalem. UNESCO Ref. No. 120 EX/14, p.11 para. 4.1. See also UNESCO Ref. No. 127 EX/12, p. 18.

116 *The Palestine Gazette* No. 1375, Supplement No. 2 (1944), p. 1271.

117 Department of Antiquities Permit Number A/219/1970/01 granted on 1 January 1970 following an external request to the Israeli Department of Antiquities. Telephone interview with John Seligmann, IAA District Archaeologist for Jerusalem, on 6 November 1996.

118 Again, see section 5.1.1.

119 Interview with IAA archaeologist Zvi Greenhut on 10 September 1996.

Jerusalem Municipality and the IAA, formerly the Israeli Department of Antiquities.[120]

The first phase of digging occurred between 1968 and 1975. During that period the tunnel extended about 240 meters from the Western Wall of the Haram al-Sharif. In 1981 work resumed and the tunnel was extended to about 305 meters so that it almost reached the north-west corner of the Haram platform.[121]

In March 1987 part of the ceiling at the northern end of the tunnel collapsed opening up a means of access to an ancient aqueduct less than a meter wide and up to eight meters high and at least one hundred meters in length. The aqueduct opened onto the southern part of a large double Hasmonean cistern located underneath the Convent of the Sisters of Zion, the Via Dolorosa and an Islamic Waqf property where the Via Dolorosa meets Tariq al-Wad. Subsequently, some Israeli officials favored opening the tunnel to the public in the form of a one-way circuit with an entrance at the Western Wall and a means of exit near the Convent of the Sisters of Zion.[122] In fact excavations were begun for this purpose in the spring of 1988 in the street leading to Bab al-Ghawanima, one of the northern entry gates to the Haram al-Sharif. A number of serious clashes between Palestinians and members of the Israeli security forces took place in this area of the Old City in response to these works since Palestinians saw this as an interference with means of access to the Haram al-Sharif and an attack upon it. The work was abandoned and the scheme was shelved.

In 1994 another initiative was taken in order to facilitate access to the tunnel. Under the auspices of the Israeli Ministry of Religious Affairs an underground platform and a semi-circular tunnel was dug, more than 2 meters high and 1.5 meters wide in order to link the two portions of the double cistern. The main purpose of these works was to create a reception area to enable tour groups to pass each other and to double the capacity of the tunnel. Once again, the Islamic Waqf which owns the property which lies above and enjoys legal title to the sub-soil was not informed in advance of the work and its consent was not obtained regarding this tunneling.[123]

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[120] UNESCO Ref. No. 127 EX/12, p. 19.

[121] *Ibid.* p. 18.

[122] See report of the Director-General of UNESCO's Special Representative on Jerusalem. UNESCO Ref. No. 131 EX/17, p. 4, para. 3.

[123] UNESCO Ref. No. 135 EX/11, p. 11, para. 14.5.

Plans to create an exit from the tunnel into the Via Dolorosa were revived in the 1990s. In the latter part of 1994 or in 1995 a staircase which led to a wall on the Via Dolorosa was cut into the solid rock which once supported the Roman Antonia fortress. During his visit in May 1995, the Israeli authorities informed the director-general's special representative of their intention to open an exit from the tunnel onto the Via Dolorosa.[124] Just after midnight on 24 September 1996, Israeli workmen secretly opened the entrance to the tunnel.[125] The move provoked violent confrontations between Palestinians and members of the Israeli security forces in the following days. On 26 September 1996, Director-General of UNESCO Federico Mayor called upon the Israeli government to rescind its decision and close the tunnel. He stated:

> It [the tunnel] contravenes the 1956 New Delhi recommendation which forbids excavations in occupied territory, signed at the time by the State of Israel. UNESCO's General Conference and Executive Boards have repeatedly condemned such excavations and recommended to the Israeli authorities to abandon these undertakings.[126]

5.1.2 Case Study: Excavations at the Cemetery of Deir al-Balah

In 1972 an exploratory expedition and excavations were conducted at a cemetery in the Gaza Strip, near the town of Deir al-Balah. The excavations were a joint project of the Hebrew University and Tel Aviv University under the direction of Trude Dothan of the Hebrew University.[127] Four anthropoid clay coffins dating from the reign of the Egyptian Pharaoh Ramses II in the thirteenth century BCE were found and excavated. Human faces had been modeled onto the lids of the coffins and showed strong signs of Egyptian influence. The coffins contained a number of items including bronze and alabaster vessels, jewelry, scarabs, and various utensils.

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[124] Report of the Director-General of UNESCO's Special Representative on Jerusalem. UNESCO Ref. No. 147 EX/17, p. 6, para. 3.

[125] Bill Hutman, "Tunnel Opening Sparks Arab Protests," *The Jerusalem Post*, 25 September 1996, p. 1.

[126] UNESCO Press Release, 26 September 1996.

[127] Trude Dothan and Moshe Dothan, *People of the Sea: The Search for the Philistines* (New York: Macmillan, 1992) pp. 202-8.

Excavations were later conducted 320 meters east of the cemetery, where a complex of mud brick structures containing fragments of cooking pots, grinding stones, pestles and mortars, and significant quantities of imported Cypriot and Mycenaean pottery, ovens, and grinding stones was excavated. A large residential structure built in the royal Egyptian style was found containing pottery vessels, a seal made of steatite and various tools, utensils, and molds for manufacturing female figurines were found, dating to the second half of the fourteenth century BCE An 18 meters square, heavily fortified citadel of Egyptian design and a reservoir about 20 meters square from the fourteenth century BCE were also excavated. Above the citadel an artists' complex was found dating to the thirteenth century BCE. Unfired pieces of anthropoid coffins and kilns containing coffin bases were found, as well as other artifacts associated with the funeral ceremonies carried out in the nearby cemetery.

Large amounts of the material discovered during the excavations at Deir al-Balah is now on display in the Israel Museum and the Institute of Archaeology of the Hebrew University.[128]

5.1.3 Case Study: Excavation of Samaritan Sites in the Northern West Bank

In recent years, excavations have taken place at various sites in the northern West Bank where Samaritan synagogues were believed to be located.[129] Israeli authorities have either conducted the excavations themselves or have authorized Israeli institutions to undertake them.

In December 1990 an excavation was carried out at the Samaritan synagogue at al-Khirbe in Nablus district, two and one-half kilometers south of the village of Sebastiya.[130] The excavations were directed by Yitzhak Magen, Israeli antiquities staff officer for the West Bank. The archaeological finds dated mainly to the Roman-Byzantine period. The most significant discovery was a partially preserved mosaic, measuring 5.3 by 9 meters. The mosaic depicted objects for ritual use in the Jewish Temple, including a menorah and

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[128] See section 5.2.

[129] Yitzhak Magen, "The Samaritan Synagogue at Khirbet Samara," *Israel Museum Journal*, Vol. XI (1993), p. 59.

[130] Ephraim Stern (ed.), *The New Encylopaedia of Archaeological Excavations in the Holy Land* Vol. 4 (Jerusalem: Israel Exploration Society and Carta, 1993) pp. 1425-6.

the Ark of the Covenant. The central section of this mosaic is now on display in the Israel Museum.[131]

Between 1989 and 1991 excavations were carried out at Khirbet Majdal, in Nablus district, a site now located in the Jewish settlement of Zur Natan, under the direction of Etan Ayalon on behalf of the Eretz Israel Museum in Tel Aviv.[132] The southern part of the site contained a complex of rooms which the excavators thought to be a Byzantine monastery. Masonry and rock-cut installations, including an oil-press, stone basins, and mills were found in the rooms. South-east of the monastery a public building was discovered. According to excavators, this building was probably a Samaritan synagogue, dating from the fourth or fifth century CE. A mosaic pavement was found inside the threshold of the main entrance decorated with geometric and floral designs, as well as representations of columns and pomegranates.

In 1991 excavations took place on behalf of the antiquities staff officer for the West Bank at a Samaritan synagogue at Khirbet Samara in Nablus district, located south of the Nablus-Tulkarem road.[133] A large stone was discovered bearing a depiction of the Ark of the Covenant in relief. Two mosaics were also found. Only two sections of the first mosaic survive. One mosaic depicted various fruits and plants, as well as the Ark of the Covenant. The other mosaic also represented the Ark of the Covenant in a similar design. The stone and the second mosaic depicting the Torah ark are now both exhibited in the Israel Museum.[134]

5.1.4 Case Study: Operation Scroll and Subsequent Excavations in the Jericho Area

On 14 November 1995 the IAA, under the joint supervision of IAA director Amir Drori and Yitzhak Magen, Israeli antiquities staff officer for the West Bank, launched a large archaeological survey, accompanied by archaeological excavations, inside the West Bank and Israel along a 100

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131 See section 5.2.

132 Stern, *The New Encyclopedia*, p. 1427; Etan Ayalon, "Horvat Migdal (Zur Natan) - 1990," *Excavations and Surveys in Israel*, Vol. 10 (1991), p. 114; and Etan Ayalon "Zur Natan (Horvat Migdal)," *Excavations and Surveys in Israel*, Vol. 13 (1993) p. 45.

133 Stern, *The New Encyclopedia*, pp. 1424-5, Magen, "The Samaritan Synagogue at Khirbet Samara," p. 59, and information accompanying Israel Museum display.

134 See section 5.2.

kilometer-long area from Wadi Dalia north of Jericho to 'Ein Gedi to the south.[135] The project, popularly known as Operation Scroll, employed 20 archaeological teams consisting of 80 Israeli archaeologists and a large number of Palestinian laborers from the OPT.

According to the IAA, the objective of the operation was to search for religious scrolls dating from the second century BCE. The Dead Sea Scrolls had been discovered at Qumran in the same area in the 1940s and 1950s. The IAA justified the excavations in the following terms:

> The Operation is conducted in accordance with the Jordanian law and in accordance with international law and the Hague Convention which states that archeological artifacts in an occupied area must be preserved, and that is the purpose of the operation; to protect the archeological artifacts from antiquity robbers.[136]

The search was launched two months after the signing of the DOP by Israel and the PLO on 13 September 1993. This agreement envisaged the transfer of the town of Jericho and an unspecified area of land surrounding the town to Palestinian control. Many persons and institutions regarded the search as an attempt by the IAA to remove antiquities from areas which might be placed under Palestinian control in the following months. In a letter to the IAA, Professor Aharon Kempinski, Chairperson of the Association of Archaeologists in Israel, stated:

> [This is] an attempt to conduct an archeological coup before the area is handed over, in several months, to the autonomy authorities or the Palestinian Administration in Jericho.[137]

The IAA has maintained that the operation was planned between 1990 and 1991, well before the signing of the DOP, and was launched in 1993 because

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[135] Abraham Rabinovich, "Major Search under Way for Scrolls in Judean Desert," *The Jerusalem Post*, 15 November 1993, p. 12; Abraham Rabinovich "Bar-Kochba Period Document Found," *The Jerusalem Post*, 19 November 1993, p. 12A.

[136] Letter from Dr. Aharon Kempinski, Chairperson of the Associations of Archaeologists in Israel to the IAA. Translated and reprinted in Lapidoth and Hirsch, "International Law," p. 520.

[137] Statement of IAA spokesperson Efrat Orbach in Lapidoth and Hirsch, "International Law," p. 520.

funds became available at that time.[138]

On 26 November 1993, only 12 days after the launch of the operation, the Director of the IAA was reported to have said that over 400 caves and "hundreds, maybe thousands of rock recesses" had been searched.[139] *The Jerusalem Post* reported that thousands of items were discovered during the course of the operation. The preserved body a Canaanite man aged around 40 years old was found wrapped in a sack and lying on a straw mat with a bow, arrows and a flint knife beside him.[140] Some fragments of papyrus documents dating from the second century CE and written in Aramaic and Greek, dealing with financial matters, were found in a cave overlooking Jericho in Wadi Qarantal by Israeli archaeologist Hanan Eshel.[141] Other reported discoveries included remnants of textiles, coins, a pottery shard bearing a Hebrew inscription, and gold and silver jewelry.[142]

The excavations attracted a great deal of opposition from a number of Palestinian and Israeli archaeologists, including Dr. Kempinski, on the basis that the excavation and removal of artifacts from occupied territory violated international law.[143] There was also concern among many archaeologists about the lack of professionalism of the work being carried out.[144] Dr. Nazmi al-Jubeh, Department of History at Birzeit University, described the work as a "search for artifacts rather than excavations."[145] The work was conducted at such a pace that many standard scientific procedures, such as stratigraphic analysis, were not used. According to Dr. al-Jubeh, many of the laborers employed by the IAA were not properly supervised. Generally, they were ordered to dig in a cave and to report on any finds.

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[138] Interview with IAA archaeologist Zvi Greenhut on 10 September 1996.

[139] Abraham Rabinovich, "Qumran's Caves Bloom with Antiquities," *The Jerusalem Post*, 29 November 1993, p. 12.

[140] Rabinovich, "Bar-Kochba Period Document Found," p. 12A.

[141] Abraham Rabinovich, "Skeleton Found Near Jericho Identified as Canaanite Warrior," *The Jerusalem Post*, 26 November 1993, p. 12A.

[142] *Ibid.* and Rabinovich, "Bar-Kochba Period Document Found," p. 12A.

[143] Abraham Rabinovich, "Palestinian Archeologists Asked to Join Scroll Search," *The Jerusalem Post*, 17 November 1993, p. 14.

[144] Geoff Hartman, "Zionist Constructions of the Past: Archeology in the Service of the State" *News from Within*, Vol. X No. 9 (September 1994), p. 25.

[145] Interview with Dr. Nazmi al-Jubeh, 13 January 1996.

In August 1995 it was reported in the media that Israeli archaeologists had discovered four collapsed caves made by humans near Khirbet Qumran not far from the area where the Dead Sea Scrolls had been found.[146] According to *The Jerusalem Post*, excavations by Israeli archaeologists were planned to commence within the following few months before the area was handed over to Palestinian control.[147] In December 1995 an excavation, under the direction of Hanan Eshel of Bar-Ilan University and Magen Broshi, a former curator of the Dead Sea Scrolls at the Israel Museum, was launched.[148] It was hoped that more scrolls would be discovered during the excavation. No scrolls were in fact found, although three man-made caves, containing coins and pottery, and about 60 nails were excavated[149].

5.1.5 Analysis of Case Studies

The excavations discussed in these case studies were illegal under international law. In none of these cases was there evidence that the site was endangered by construction or other public works. None of these excavations can be classed as salvage excavations, the only type of excavation which is permissible under the Hague Convention of 1954.

Israeli authorities argued that the excavations at Deir al-Balah and south of Jericho were necessary in order to pre-empt the activities of antiquities thieves. In fact part of the site at Deir al-Balah, as well as many of the sites south of Jericho, were previously undiscovered and, therefore, were not particularly vulnerable to antiquities thieves. The rest of the site at Deir al-Balah and some of the sites south of Jericho, however, had been seriously damaged by antiquities robbers. This state of affairs required the Israeli government to act upon its obligations under the Hague Convention of 1954 to stop the vandalism of the sites and the stealing of antiquities. It did not provide a legal justification for the conduct of excavations. In fact, in the

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146 "Archeologists Find New Dead Sea Caves," *The Jerusalem Post*, 13 August 1995, p. 2.

147 *Ibid.*

148 Abraham Rabinovich, "Dig at Newly Found Qumran Caves Begins," *The Jerusalem Post*, 18 December 1995, p. 2.

149 Abraham Rabinovich, "New Evidence Nails Down Qumran Theory," *The Jerusalem Post*, 5 April 1996, p. 8.

case of Deir al-Balah it appears that the theft of antiquities was condoned at the highest levels of the Israeli government[150].

5.2 Removal of Cultural Property from the Occupied Palestinian Territories

Article 1 of the Hague Protocol of 1954 places Israel under an obligation to prevent the exportation of cultural property from the OPT. Israel has contravened this provision by removing large amounts of cultural property from the OPT. Further, Israeli authorities have failed to take adequate measures to put a stop to unauthorized transfers, normally connected in violation of the various antiquities laws. Much of the information concerning removal of cultural property from the OPT, especially the removal of artifacts which were excavated illegally, is not in the public domain. A few well-documented cases do exist, mainly concerning artifacts which are on public display in Israeli museums. It is highly likely that there are thousands more artifacts which originated in the West Bank and the Gaza Strip and have been clandestinely removed from the OPT—either to inside Israel or even further afield. Many of these artifacts will probably never be located because they were excavated or acquired clandestinely and their owners may be reluctant to reveal the provenance of these objects, fearing that they may be confiscated, or the owners may genuinely be unaware of the items' exact origins.

A great deal of material has been removed by the Israeli authorities themselves. As discussed above, the antiquities staff officers for the West Bank and the Gaza Strip, have conducted large numbers of excavations in the OPT. Although most of the material from these excavations is reportedly stored in an IAA warehouse in Sheikh Jarrah in East Jerusalem, some material has been transferred out of the OPT. The antiquities staff officers also exercise control over most artifacts originating from excavations by persons or institutions granted excavation licenses by the officers.

The IAA and the antiquities staff officers have authorized the display of many artifacts from the OPT in Israeli museums and other institutions. The acceptance of such items by those Israeli museums which are or have been members of ICOM, including, the Israel Museum in Jerusalem and the Edith and Reuben Hecht Museum in Haifa, is in breach of ICOM's Code of

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[150] See section 5.2.1.

Professional Ethics of 1986 which requires ICOM's members to respect fully the Hague Convention of 1954.[151] In an interview, Yael Israeli, acting curator of archaeology at the Israel Museum, when asked whether the Israel Museum was concerned about the fact that it is displaying material from the OPT which has been removed in violation of international law and the ICOM Code of Professional Ethics stated that she believed that the Israel Museum is preserving such material for future generations.[152]

The Israel Museum contains a number of artifacts from excavations conducted in the West Bank and the Gaza Strip including furniture, mosaics, anthropoid sarcophagi, jewelry, pottery, and metalware.[153] A large display is devoted to Samaritan synagogues in the northern West Bank. There are also exhibitions of artifacts discovered in the excavations in Silwan and the "Jewish Quarter" in East Jerusalem, as well as excavations at Shiloh in the northern West Bank.

The Edith and Reuben Hecht Museum at Haifa University has an exhibition devoted to finds from the Mazar excavations conducted along the south and south-western walls of the Haram al-Sharif between 1968 and 1977. Artifacts on display include pottery, various types of lamps, bone artifacts, and stonework dating from the first century BCE and the first century CE. There are also objects from the fifth-sixth century CE, such as pottery bowls, lamps, an engraved stone jar handle, and stone jars.

There is also a small exhibition at the Hebrew University's Institute of Archaeology displaying material from the institute's excavations at Deir al-Balah, including two complete anthropoid sarcophagi and one coffin lid, pottery of various types, bronze objects, and gold and carnelian jewelry.

Following the 1967 war the Palestine Archaeological Museum's collections were placed under the supervision of the Israel Museum. The Israel Museum has since 1967 removed a significant amount of material from the Palestine Archaeological Museum in East Jerusalem and placed it on exhibition in the Israel Museum's premises in West Jerusalem.[154] Such items include ivories, pottery, statues, and figurines. Also, there is on display in the Israeli Supreme

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[151] The Edith and Reuben Hecht Museum was a member of ICOM between 1988 and 1995.

[152] Interview with Yael Israeli, Acting Chief Curator of Archaeology at the Israel Museum, 27 November 1996.

[153] See Appendix I for a list of selected items recovered in the OPT after 1967 and displayed in Israeli institutions.

[154] See Appendix II for a list of selected items from the collection of the Palestine Archaeological Museum currently displayed in Israeli institutions.

Court a mosaic from Sebastiya which was removed from the Palestine Archaeological Museum. According to Ornet Ilan, curator of the Palestine Archaeological Museum, most of the material now located at the Israel Museum was transferred from the Palestine Archaeological Museum soon after Israel occupied East Jerusalem in 1967.[155] Although she could not state precisely the number of items which have been taken to the Israel Museum, she described it as being "dozens". Ornet Ilan also stated that in the past 10 years very few items have left the Palestine Archaeological Museum and that, on most occasions, their removal has been for the purpose of display only in temporary exhibitions elsewhere. The Israel Museum's current policy is not to allow items to leave the Palestine Archaeological Museum except for such a purpose.

According to Yael Israeli items were not removed from the Palestine Archaeological Museum in pursuit of a defined policy. The general policy of the Israel Museum, which was given responsibility for looking after the collections in the East Jerusalem museum after 1967, was to retain the museum in its former state. At the same time some material was transferred for exhibition at the Israel Museum. According to Yael Israeli, some material from the Israel Museum has been put on display at the Palestine Archaeological Museum She explained an internal debate about the Palestine Archaeological Museum in so much as the museum poses a problem because there are two parallel museums in Jerusalem which deal with the same area. In certain cases material from an archaeological site which has been excavated more than once is split between the two museums.

A number of items originating from the Palestine Archaeological Museum, such as the ivories from Sebastiya and artifacts from Lachish, appear to have been on the display in the Israel Museum for over 20 years. Such items are incorporated into the permanent exhibitions in the archaeological wing of the Israel Museum. There is a legitimate concern that the Israeli authorities and the Israel Museum may intend to retain these items.[156]

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[155] See Appendix II for a list of selected items from the collection of the Palestine Archaeological Museum currently displayed in Israeli institutions.

[156] Such a suggestion is supported by information reported by Hershl Shanks about a position being developed by lawyers at the Israeli Ministry of Foreign Affairs ("Peace Politics and Archaeology," *Biblical Archaeology Review*, Vol. 20 (March/April 1994), p. 50). According to the author, "the Israel Foreign Office will make a legal distinction [from the precedent provided by Israel's return of cultural property to Egypt, when addressing claims for the return of cultural property to Egypt, when addressing claims for the return of cultural property removed from the OPT], as one of its lawyers has told me: 'When Israel occupied Sinai in 1967, Sinai belonged to Egypt: but the West Bank belonged to no one before 1967. Neither Israel nor the rest of the world (except Britain and Pakistan) recognized Jordanian survey over the West Bank and certainly no one recognized it as belonging to a sovereign national entity called Palestine.' "

It is widely believed that hundreds of archaeological artifacts, most of which have been excavated illegally, have been transferred through dealers to individuals and institutions in Israel as well as to states other than Israel. In 1989 the Anti-Plunder Task Force of the Israeli Department of Antiquities estimated that the number of archaeological sites robbed in the OPT ran into the thousands.[157] As noted above, it is very difficult to document incidents of theft and illegal transfer to the OPT because such activity is illegal. One relatively well documented case discussed below, concerns Moshe Dayan, a former Israeli minister of defense and minister of foreign affairs. Moshe Dayan's entire antiquities collection, including artifacts which were illegally excavated or transferred from the OPT, was acquired by the Israel Museum in 1986.

Although most of the transfers of antiquities from the OPT to private individuals and institutions have been clandestine, military orders which Israel introduced in the West Bank and the Gaza Strip enable licenses to be issued to individuals authorizing them to transfer antiquities out of the OPT, although such transfers are clearly illegal under the Hague Protocol of 1954. In one documented case, the Israeli authorities issued a license to a Palestinian merchant from Rafah permitting him to transfer a large number of antiquities out of the Gaza Strip.[158]

5.2.1 Case Study: Material from Deir al-Balah

The excavations which took place at Deir al-Balah have been discussed above. While excavations of four anthropoid sarcophagi were conducted by Hebrew University, the graveyard at Deir al-Balah was systematically robbed by antiquities thieves. Trude Dothan, the director of excavations at the cemetery of Deir al-Balah, has written that at least 45 Canaanite anthropoid coffins were dug up and removed from the cemetery at Deir al-Balah. Of these, 23 complete coffins and 10 additional coffins lids found their way into the collection of Moshe Dayan, in addition to smaller items such as

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157 David Ilan, Uzi Dahari and Gideon Avni, "Plundered! The Rampant Rape of Israel's Archaeological Sites," *Biblical Archaeology Review*, Vol. XV (March/April 1989), pp. 38, 42.

158 Interview with Hani 'Abdallah, archaeologist, PNA Department of Antiquities in the Gaza Strip employee and Department of Antiquities of the Israeli Civil Administration in the Gaza Strip former employee, 22 August 1995.

statuettes, pottery, ossuaries, and funerary stelae.[159] Dayan, Israeli minister of defense at the time of the 1967 War and later foreign minister in the government of Menachem Begin, was a notorious antiquities collector. According to one source:

> For years, Dayan has come under intense criticism for the manner in which he had assembled his collection. He excavated a portion of it himself in violation of Israeli law, occasionally using his position as defense minister to commandeer helicopters and troops to help him excavate and retrieve artifacts. Dayan bought most of his collection, however, through a network of Arab traders and overseas dealers. Many of these dealers had themselves obtained the objects under questionable, if not illegal, circumstances.[160]

In one of her books Trude Dothan alludes to Dayan's active encouragement of the activities of the thieves at Deir al-Balah: "Dayan had his own contacts with Hamad [a Palestinian who served as the operations chief for the excavations], and ... a great deal of information was unnecessarily lost as a result of this unauthorized digging."[161] In February 1982, following Moshe Dayan's October 1981 death, the Dayan antiquities collection, comprising more than 1,000 items, was acquired by the Israel Museum for one million US dollars with the assistance of a US citizen named Leonard Tisch.

Material from Deir al-Balah, mainly originating from the Dayan collection, is now exhibited in at least two Israeli institutions. A large number of coffins, in addition to other artifacts, are on display at the Israel Museum. The Hecht Museum at Haifa University, exhibits two of Deir al-Balah's anthropoid coffins. One sarcophagus was sold to the Hecht Museum by the Israel Museum and the other is on loan from the same institution. The Hecht Museum exhibition also contains other material from the cemetery, such as alabaster vessels, limestone figurines, bronze objects, alabaster cosmetic boxes, and gold and carnelian jewelry.

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159 Tally Orman, "The Dayan Collection," *Israel Museum Journal*, Vol. 2 (1983), p. 5, and Tally Orman, *A Man and His Land: Highlights from the Moshe Dayan Collection* (Jerusalem: Israel Museum, 1985) pp. 22, 24, 31-2, 90-5, and 131-2.

160 Leroy Aarons, "The Dayan Saga, the Man and His Archaeological Collection," *Biblical Archaeology Review*, Vol. VIII, No. 5 (September/October 1982), pp. 26, 28.

161 Dothan, *People of the Sea*, p. 205.

5.2.2 Case Study: Sebastiya

The historical site of Sebastiya is located in the northern West Bank, a few kilometers from Nablus. Remains exist there of what is believed to have been the capital of Samaria, founded in about 880 BCE by the Israelite King Omri, as well as Hellenistic fortifications dating from about 300 BCE.[162] The most impressive remains—including a forum, basilica, theater, temple, tombs, and columned street—date from the Herodian town of Sebaste about 25 BCE. The whole area, however, is rich in antiquities. The ruins of a Byzantine church and a monastery can be found, as well as a Crusader church associated with the cult of John the Baptist. The site also contains a mosque constructed by Salah al-Din.

According to the Sebastiya Village Council, many antiquities have been stolen from the area and transferred to Israel.[163] The thefts have been carried out mainly by Palestinian antiquities thieves, although there also have been documented two incidents of unlawful removal of antiquities by the Israeli authorities. In the late 1970s certain residents of Sebastiya witnessed Israeli soldiers stealing a column in Sebastiya and lodged a complaint with the Israeli authorities. The Israeli military later returned the column to its original site.

In a second incident in 1987, the Israeli military and Civil Administration removed a statue of Salomé and four Roman busts, from Sebastiya.[164] The items originally had been located in a Byzantine church in Sebastiya and were transferred to the mosque, itself a historic site, during the period of Jordanian administration of the West Bank. At about 9:00 a.m. on 7 July 1987 a large force of Israeli soldiers arrived in Sebastiya and went to the mosque, located in the center of the town. The force was headed by an Israeli officer known as "Captain Charlie" from the Nablus office of the Civil Administration who was accompanied by a member of the Civil Administration's Department of Antiquities. Mihat Rageb al-Qayed, a Waqf employee, was present at this time in one of the buildings of the mosque. The soldiers knocked on the door but al-Qayed did not open the door since the Waqf had warned him that persons might try to seize the antiquities. (The Civil Administration previously had contacted the Waqf on the issue.) Israeli soldiers then broke down the door and removed the statue of Salome and the four busts from the

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162 P. W. Hamilton, *Guide to the Historical Site of Sebastieh* (Jerusalem: Department of Antiquities, Government of Palestine, 1936).

163 Al-Haq Fieldwork Report No. 137/96, 25 May 1996 (Arabic).

164 Al-Haq Affidavit No. 4813 of Mihat Rageb al-Qayed, 25 May 1996 (Arabic).

building. When al-Qayed tried to stop the soldiers, "Captain Charlie" pointed a gun to al-Qayed head and said, "These statues are ours." The employee was detained for about 24 hours. The soldiers refused to give the Waqf any receipt for the antiquities, although al-Qayed requested one. The present location of these items is unknown.

Since the beginning of the occupation large numbers of antiquities have been stolen from the area. According to the Sebastiya Village Council, Israeli authorities have been negligent in enforcing the Jordanian Antiquities Law despite their obligations under article 4(2) of the Hague Convention of 1954, which requires them to halt any form of theft of antiquities. When Israeli authorities have arrested persons for stealing antiquities in the area, they normally have been released after being detained for no more than one day and paying a small fine. In addition, the site has not been adequately guarded in the past. The Israeli Civil Administration employed one Palestinian at the site of ancient Sebastiya whose function was to handle visitors. It employed no guards or inspectors at the site. According to members of members of the Sebastiya Village Council, the lack of law enforcement may have encouraged some Palestinians to steal antiquities. The problem of theft has intensified since 1993, possibly as a result of economic hardship suffered when the Israeli authorities severely restricted access to Palestinians from the OPT to jobs in Israel and Jerusalem. Many of these antiquities are sold to dealers or agents of dealers. The eventual market for most of these antiquities is Israel. Thefts have not been confined to small, portable items but also reportedly include Roman plinths, columns, and capitals. Village Council members reported that bulldozers and trucks come to the area at night to carry away the columns.

5.2.3 Case Study: The Temple Scroll

The Temple Scroll is one of the Dead Sea Scrolls recovered from Qumran in the 1950s and dates back to the first century BCE.[165] This scroll is the longest scroll discovered, measuring about 9 meters. It deals with sectarian matters including five principal issues: construction and rituals of an ideal Jewish Temple; the celebration of religious festivals; sacrifices; the laws of purity; and, the directives to be followed by an idealized Israelite ruler. The Temple Scroll was removed at some point in the 1940s or 1950s from one of

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165 Moshe Pearlman, *The Dead Sea Scrolls in the Shrine of the Book* (Jerusalem: Israel Museum, 1988) pp. 44, 46.

the caves in Qumran. In 1960 a person from the United States contacted Yigael Yadin, an Israeli general and archaeologist, and offered to sell him a number of scrolls including the Temple Scroll. The scrolls were by then in the hands of Khalil Iskandar Shahin Kando, an antiquities dealer from Bethlehem.[166] In contravention of the Antiquities Ordinance of 1929, applicable in Jordan at the time, the finder of the scroll had not declared its existence to the Jordanian authorities. Following Israel's capture of Bethlehem on 7 June 1967, the Israeli military placed a lieutenant-colonel of the military intelligence at the disposal of Yigael Yadin to conduct a search for the scroll. Khalil Kando was located and taken for interrogation. He eventually took the lieutenant-colonel to his home where he removed a shoe box containing the scroll from under the floor. Other scroll fragments were also found at the dealer's home, The military government confiscated the scroll from the dealer in accordance with the Jordanian Antiquities Law of 1966. The scroll was later purchased from the dealer for US $105,000 for the Dead Sea scroll exhibit at the Shrine of the Book at the Israel Museum.[167] Israel appears to regard the scroll as the property of the Shrine of the Book.

Although compensation was paid to the dealer, the removal of the Temple Scroll to the Israel Museum violated the Hague Protocol which prohibits the export of cultural property from occupied territory.

5.3 Temporary Exhibitions outside Israel of Artifacts from the Occupied Palestinian Territories

In recent years foreign museums and libraries, principally in the United States, have begun to accept for display in temporary exhibitions loans of archaeological artifacts which have been removed from the OPT. Such exhibitions have received direct governmental support. Between 1986 and 1988 a traveling exhibition entitled *Treasures of the Holy Land: Ancient Art from the Israel Museum* was displayed at three major US museums: Metropolitan Museum of Art in New York City, Los Angeles County Museum of Art, and Museum of Fine Arts in Houston.[168] The exhibition

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166 Yigael Yadin (ed.), *The Temple Scroll*, Vol. 1 (Jerusalem: Israel Exploration Society, Institute of Archaeology of Hebrew University of Jerusalem and the Shrine of the Book, 1983) p. 1.

167 UNESCO Ref. No. 83 EX/12, Annex II, p. 3.

168 Metropolitan Museum of Art, *Treasures of the Holy Land: Ancient Art from the Israel Museum* (New York: Metropolitan Museum of Art, 1986).

included items excavated after 1967 in the OPT and placed in the Israel Museum, such as a Middle Canaanite Period silver cup from Ein Samiya in the West Bank, a Middle Canaanite Period clay anthropoid sarcophagus, a coffin lid, and two necklaces from Deir al-Balah in the Gaza Strip, and a twelfth-thirteenth century BCE bronze bull.

While all items were described as originating from the Israel Museum, a significant number of items on display were taken from the collections of the Palestine Archaeological Museum. Some of these items had been removed by the Israel Department of Antiquities after 1967 and placed on display in the Israel Museum. The museum's premises and property were appropriated illegally by the Israeli government following its annexation of East Jerusalem in 1967.[169] Such items included two Natufian handles with animal figures dating from the tenth millennium BCE, four ivories from Samaria dating from the ninth-eighth century BCE; three ivories, and a bronze ceremonial stand, and a vase depicting Orpheus from Megiddo dating from the tenth-fifth century BCE, a rock crystal portrait of the Emperor Vitellius dating from the first century CE, and a statue of the goddess Kore dating from the second century CE.

In 1993 and 1994 a temporary exhibition of Dead Sea Scrolls and other material was mounted at the Library of Congress in Washington, DC, the New York Public Library, and the De Young Memorial Museum in San Francisco.[170] IAA prepared the exhibit. Later in 1994 the same exhibition was displayed in Rome at the Vatican Apostolic Library.[171] The exhibit included 11 scroll fragments as well as items such as pottery, textiles, and leather items which were uncovered in the 1950s in excavations at Khirbet Qumran. Virtually all the material on display came from the Palestine Archaeological Museum, in occupied-East Jerusalem.

The US government provided assistance for both of these exhibitions. In order to provide the objects on display for the exhibitions with immunity from seizure by judicial process, the US Information Agency director

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169 See section 5.4.

170 Ayla Sussman and Ruth Peled (eds.), *Scrolls from the Dead Sea: An Exhibition of Scrolls and Archeological Artifacts from the Collections of the Israel Antiquities Authority* (Washington DC: Library of Congress, 1993).

171 Abraham Rabinovich, "Dead Sea Scrolls Exhibited at Vatican," *The Jerusalem Post*, 1 July 1994, p. 12A.

certified that the import of these objects served the national interest.[172] The notices included the following statements:

> The action of the United States in this matter and the immunity based on the application of the provisions of the law involved does not imply any view of the United States concerning the ownership of the exhibit objects. Further, it is not based upon and does not represent any change in the position of the United States regarding the status of Jerusalem or the territories occupied by Israel since 1957.

The Federal Council on the Arts and Humanities, a US government agency, also supported the Dead Sea Scrolls exhibition by providing an indemnity for the exhibition. This exhibition was displayed at the Library of Congress, official library of the US Congress.

Although the United States is not a party to the Hague Protocol, which prohibits the export of cultural property from occupied territory, Israel is a party to this protocol. The export of these articles by Israel for temporary exhibition in the United States breached the former's obligations under the Hague Protocol and therefore breached international law. The United States assisted Israel in contravening international law by facilitating the import of the artifacts, and, in the case of the Dead Sea Scrolls exhibition, also by indemnifying the exhibition.

The acceptance by the Vatican—which is a party to the Hague Convention and Protocol of 1954—of the display of articles which had been exported from the OPT in contravention of the protocol, clearly violated its treaty obligations.[173]

Following the adoption of ICOM's Code of Professional Ethics in November 1986, members of ICOM placed themselves under a binding obligation to respect fully the Hague Convention of 1954. The acceptance of material for exhibition which has been exported from the OPT stands as a violation of the

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[172] The notices for the exhibition *Treasures of the Holy Land: Ancient Art from the Israel Museum* are published in *Federal Register*, Vol. 50 (1985), p. 28058 and *Federal Register*, Vol. 51 (1986), p. 27624; and the notices for the exhibition *Scrolls from the Dead Sea: The Ancient Library and Modern Scholarship* are published in *Federal Register*, Vol. 58 (1993), pp. 6852, 12303.

[173] The Holy See acceded to the Hague Convention and Protocol of 1954 on 24 February 1958.

Code of Ethics by the relevant ICOM members: the Museum of Fine Arts in Houston and the Library of Congress in Washington, DC.[174]

5.4 Seizure of Cultural Property

Article 56 of the Hague Regulations of 1907 prohibits the seizure of "institutions ... devoted to education, the arts and sciences." Article 4(3) of the Hague Convention of 1954 prohibits misappropriation of cultural property. Israel has violated the prohibition on seizure by appropriating the Palestine Archaeological Museum, together with its contents, and the Madrasa al-Tankaziya in East Jerusalem.

5.4.1 Case Study: Seizure of the Palestine Archaeological Museum

The Palestine Archaeological Museum was opened officially in 1938 by the British Mandate authorities.[175] The museum was designed to house the antiquities of Palestine and the director of antiquities was under an obligation to acquire from excavations conducted in Palestine all antiquities discovered which were "indispensable for the scientific completeness of the Palestine Archaeological Museum or for the purpose of illustrating the history or art of Palestine."[176] The museum was administered by an international committee of trustees. This arrangement continued until 1966 when the Jordanian government nationalized the museum.

Much of the museum's collection is derived from the major archaeological excavations conducted in British Mandate Palestine. The museum also houses Umayyad stucco reliefs and sculptures from Khirbet al-Mafjar (Hisham's Palace) in Jericho and Romanesque lintels from the entrance of the Church of the Holy Sepulcher in Jerusalem. The most famous artifacts contained in the museum are fragments of the Dead Sea Scrolls, which were discovered in Qumran, near Jericho, between 1947 and 1956.

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174 The ICOM Code of Professional Ethics was adopted when the exhibition *Treasures of the Holy Land: Ancient Art from the Israel Museum* was already on display at the Metropolitan Museum of Art, which is also an ICOM member.

175 J.H. Iliffe, "The Palestine Archaeological Museum, Jerusalem," *The Museums Journal*, Vol. 38 (1938-39) p. 1.

176 Antiquities Ordinance 1929, section 11(1).

All property belonging to the Jordanian government was expropriated following Israel's capture of East Jerusalem in 1967 and became the property of the Israeli government. In 1967, Israel extended its jurisdiction to East Jerusalem, effectively annexing that part of the city.[177] According to section 26 of the Legal and Administrative Matters (Regulation) Law (Consolidated Version) of 1970, any government property situated in an area to which Israel extends its jurisdiction becomes the property of the State of Israel. This law applies to both immovable and movable property. As a result the Palestine Archaeological Museum and its antiquities collection became Israeli state property.

The Israeli authorities placed the museum under the care of its Department of Antiquities (now the IAA).[178] As stated above, the museum's collections are supervised by the Israel Museum (located in West Jerusalem). It has been renamed the Rockefeller Museum, in memory of J. D. Rockefeller who contributed funds toward the building of the museum.

5.4.2 Case Study: Seizure of the Madrasa al-Tankaziya and Its Vaults

On 24 June 1969 Israeli troops occupied the Madrasa al-Tankaziya, located on the south side of Bab al-Silsila, one of the gates leading to the Haram al-Sharif. The Waqf owned the building. It was built in the 1320s by Amir Sayf al-Din Abu Sa'id Tankaz, who governed first Damascus and, then, all of Syria between 1312 and 1340.[179] The building consisted of a *madrasa*, *khanqah*, and mosque. The building overlooks the Western Wall and has obvious strategic importance to the Israeli authorities. Israeli forces occupy the building which is currently used as an Israeli police station.

In addition, since 1967, vaulted rooms dating from Herodian, Byzantine, Umayyad, and Crusader periods located underneath the Madrasa al-Tankaziya have been cleared of dirt and rubble. The Israeli Ministry of Religious Affairs has converted some of these rooms, which are also Waqf property into a synagogue, known as the Hakotel Ha Ma-Arvai Synagogue,

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177 Law and Administration Ordinance (Amendment No. 11) Law of 1967 and *Kovetz Hatakanot* (Collected Regulations) No. 2065 of 28 June 1967, pp. 2690-2691.

178 Information obtained from Ornet Ilan, Curator of the Rockefeller [Palestine Archaeological] Museum, 4 September 1995.

179 Michael Burgoyne, *Mamluk Jerusalem: An Architectural Study* (Buckhurst Hill, Essex: Scorpion House Publishing, 1987) p. 22.

The Israeli authorities took the position that the destruction of these buildings in the Moroccan Quarter did not amount to a violation of the Hague Convention of 1954 because these buildings did not have sufficient cultural significance to merit protection under the convention. This position is difficult to accept given that the entire quarter formed part of a registered historical site under Jordanian law. In addition, the Old City of Jerusalem is a candidate *par excellence* for protection under article 1(c) of the Hague Convention of 1954 as a center containing large amounts of cultural property. As such, the Old City of Jerusalem including the Moroccan Quarter is protected in its entirety. The Israeli position generally has been rejected by UNESCO experts. Mr. de Angelis D'Ossat, sent by the UNESCO director-general in April 1969 to investigate the situation in Jerusalem, commented:

> To my mind, the pulling down of a whole district, even if not among the most famous or the most striking, seriously damages the compact appearance of the Old City, which was huddled within its walls, forming a close fabric of small buildings in vivid and delightful contrast with the nearby open spaces and the monumental but untrammelled lines of the Haram. Now, with this dreary and formless artificial space before our eyes, and in the absence of any definite plans for its future lay-out, we can only echo the protest made.[184]

Professor Raymond Lemaire commented, "The quarter undoubtedly contained some buildings of undeniable architectural value, notably in the Bab al-Maghareb neighborhood."[185]

As a consequence of the Mazar excavations conducted between 1966 and 1977 to the south and southwest of the Haram al-Sharif, cracks appeared in a number of buildings along the south and southwestern wall of the Haram al-Sharif. In September 1968 the Israeli authorities authorized the demolition of these buildings on grounds of public safety. The Israeli authorities demolished these buildings on 14 June 1969, including part of the khanqah or

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[184] Report of the Director-General of UNESCO's Special Representative on Jerusalem. UNESCO Ref. No. 83 EX/125, p. 4.

[185] Information note presented by the Director-General of UNESCO concerning the report submitted by Professor Raymond Lemaire on 7 October 1971. UNESCO Ref. No. 88 EX/47, p. 1.

and rooms serving worshippers at the Western Wall. This area is essentially an annex to the area in front of the Western Wall used for religious worship.[180]

5.5 Damage and Destruction of Cultural Property

The Israeli authorities have been responsible for the destruction of various historic buildings in the Old City of East Jerusalem. Digging, supervised by Israel's Ministry of Religious Affairs, along the western wall of the Haram al-Sharif also has damaged various Mamluk buildings adjacent to this important religious site. These actions clearly violated the Hague Regulations of 1907, the Fourth Geneva Convention of 1949, and the Hague Convention of 1954, all of which prohibit the willful destruction or damage of immovable cultural properly.

5.5.1 Case Study: Destruction of a Major Part of the Moroccan Quarter

On 10 and 11 June 1967, a few days after the Israel Defense Forces (IDF) took East Jerusalem in the course of the 1967 War, the IDF destroyed nearly all the buildings in the Moroccan Quarter in the southwestern section of Jerusalem's Old City, making 120 families homeless.[181] his historic quarter dated to the thirteenth and fourteenth century CE and almost all the buildings contained in it were Waqf property endowed for the benefit of the Moroccan community in Jerusalem. The objective of the demolition was to clear a large area in front of the Western Wall, so that a large plaza could be created for use by Jewish worshippers.

The IDF destroyed 135 houses, as well as a number of religious buildings and two mosques.[182] The Madrasa al-Afdaliya, built by Malek al-Afdal Nur al-Din 'Ali at the end of the twelfth century, was destroyed. This domed building consisting of three rooms was located 75 meters away from the Western Wall.[183]

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[180] UNESCO Ref. No. 131 EX/17, p. 5, para. 4.

[181] Interview with Muhammad 'Abd-al-Haq, Overseer of the Moroccan waqfs, 17 December 1996.

[182] Hamad Ahmad Abdallah Youssef, "The Moroccan Waqf," *al-Isra'* (December 1995) p. 19 (Arabic).

[183] Kay Prag, *Blue Guide: Jerusalem* (London: A. & C. Black, 1989) pp. 86-7.

along the edge of the Haram al-Sharif compound.[191] Work on this tunnel has continued intermittently until the present day. According to Adnan al-Husseini, director of Jerusalem Waqfs, the Israelis conducted two types of activities while constructing the tunnel. The first type involved the clearing of structures under buildings. This did not affect the buildings above the work.[192] The second type of activity involved digging in the sub-soil. One-third of the entire length of the tunnel excavated involved actual digging. This activity caused soil subsidence and damaged a number of Mamluk religious buildings that line the western wall of the Haram al-Sharif and are located above the tunnel. These monuments form part of one of the finest collections of Mamluk buildings in the world. According to Adnan al-Husseini, director of the Jerusalem Waqf, most of the buildings parallel to the western wall of the mosque and above the tunnel have developed cracks. The Madrasa al-Uthmaniya and the Ribat Kurd have suffered the most severe damage as a result of the digging of the tunnel.

The degree of irresponsibility of the Israeli authorities in authorizing tunneling under these ancient Mamluk monuments can only be appreciated if one is aware that most of the buildings in the Old City of Jerusalem do not have structural foundations. Soil movement caused by tunneling may, therefore, have serious consequences for the stability of buildings. Damage can even occur years after the original tunneling is executed. One Palestinian engineer has estimated that in over 90 percent of cases where foundation-related defects are found in the Old City, the damage resulted from ground settlement or movement caused by nearby excavations.[193]

In the early 1970s the floored part of the Madrasa al-Uthmaniya collapsed as a result of the digging. The madrasa is believed to have been founded in the 1430s by Isfahan Shah Khatun, and is one of the most imposing Mamluk monuments in Jerusalem.[194] The floor was replaced but many cracks remain in the building. The equilibrium of the soil has been changed and this problem cannot be resolved. In addition, the Israeli authorities opened a hole leading from the tunnel through the floor of the five meters by four meter mosque inside the Madrasa al-Uthmaniya. The Israelis now claim that this area forms an integral part of the tunnel and prevent the Waqf authorities from entering

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[191] See section 5.1.1.

[192] Interview with Adnan al-Husseini, Director of Jerusalem Waqfs, 10 December 1996.

[193] Khaled al-Khatib, *The Conservation of Jerusalem* (Jerusalem: Palestinian Academic Society for the Study of International Affairs, 1993) p. 64.

[194] Burgoyne, *Mamluk Jerusalem*, p. 544.

madrasa or zawiya al-Fakhriya, also known as the Dar Abu-Sa'ud, situated in the southwestern corner of the Haram al-Sharif compound.[186] This Mamluk building was constructed by the Fakhr al-Din Abu-'Abdallah prior to his death in 1331, it contained the 'Omari mosque.[187] The Israeli authorities, including the Director of the Department of Antiquities. Biran refused to acknowledge that cultural property had been demolished. In a report to UNESCO, the government of Israel stated:

> Subsequent to the Six Days War some dilapidated houses near the excavations' site were pulled down, for safety reasons, but they included not one historical or cultural building.[188]

Both commissioners-general were of the view that these buildings were of historical importance and were protected under the Hague Convention of 1954.[189] Professor H. Reinink, the commissioner-general accredited to Israel, who was not informed in advance of the intentions of the Israeli authorities, stated: "The whole site is a monument that has suffered badly."[190] Mr. Reinink submitted a formal protest to the Israeli authorities against this violation of the Hague Convention of 1954, as soon as he learned what had happened.

5.5.2 Case Study: Damage to Buildings above or near the Tunnel Running North of the Western Wall of the Haram al-Sharif

As discussed above, in 1968 the Israeli Ministry of Religious Affairs secretly initiated the digging of a tunnel which runs north from the Western Wall

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186 Rouhi al-Khatib, "The Judaization of Jerusalem," in Yonah Alexander and Nicholas N. Kittrie (ed.), *Crescent and Star: Arab and Israeli Perspectives on the Middle East Conflict* (New York and Toronto: AMS Press, 1973) p. 244.

187 Burgoyne, *Mamluk Jerusalem*, p. 258.

188 Observations of the Government of Israel on the Alleged Violations of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. UNESCO Ref. No. 87 EX/34, p. 2, para. 6.

189 UNESCO Ref. No. 83 EX/12, p.5, para. 14(ii); UNESCO Ref. No. 83 Ex/12, Annex I, p. 4, para. 3(c); and UNESCO Ref. No. 83/EX 12, Annex II, p. 2, para. I ad (a).

190 UNESCO Ref. No. 83/EX 12, Annex II, p. 2.

it. According to Director of Jerusalem Waqfs Adnan al-Husseini, the mosque has effectively been seized by the Israeli authorities.

In December 1971 the Ribat Kurt, a building founded by Sayf al-Din al-Kurd in 1294 as a hospice for pilgrims to Jerusalem, partially collapsed as a result of soil subsidence caused by the digging of the tunnel.[195] The walls sank and some became cracked or slightly out of plumb and the flooring in part of the building also caved in.[196] Two rooms near the courtyard were severely damaged.[197]

In 1974 the eastern wall of a wing of the Madrasa al-Jawhariya was found to be caving in and a total collapse of the building was feared.[198] The Madrasa al-Jawhariya is located on the north side of the Tariq Bab al-Hadid to the west of and partly over the Ribat Kurt.[199] The building was founded by Jawhar al-Qunuqbayi and was completed in 1440. The director-general of UNESCO's Special Representative on Jerusalem concluded that subsidence caused by the tunneling had contributed to the damage. As a result, the building is now braced with unsightly reinforced concrete in order to ensure its stability. In 1984, new soil movements caused the subsidence of a number of stone courses at the base of the building's wall which supports the passageway to the Ribat Kurt.[200]

After being suspended in 1975, tunneling recommenced in 1981. This second phase of work resulted in significant damage to the Madrasa al-Manjakiya which houses the headquarters of the Department of Islamic Waqfs and Islamic Affairs.[201] This building is located on the northern side of the Bab al-Nazir and adjoins the Haram al-Sharif. The madrasa was built by Sayf al-Din Manjak in 1360. In 1981 cracks appeared on the staircases, in certain rooms, and in the public liwan. On 26 March 1984 subsidence occurred in a section of the great staircase of the madrasa. As a result of the collapse, a decision

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195 Report of the Director-General of UNESCO's Special Representative on Jerusalem, UNESCO Ref. No. 94 EX/14, para. 8, and Michael Burgoyne, "The Continued Survey of the Ribat Kurd and Madrasa al-Jawhariyya Complex in Tariq Bab al-Hadid, Jerusalem," *Levant*, Vol. VI (1974), p. 51.

196 Interview with Adnan al-Husseini, Director of Jerusalem Waqfs, 10 December 1996.

197 Burgoyne, *Mamluk Jerusalem*, p. 144.

198 UNESCO Ref. No. 94 EX/14, paras. 9-14.

199 Michael Burgoyne, *Mamluk Jerusalem*, p. 555.

200 UNESCO Ref. No. 120 EX/14, p. 12, para. 7.

201 Samir Muhammad Abu-Leil, "The Madrasa al-Manjakiya," *Huda al-Islam* No. 2 (October 1985), p. 52 (Arabic).

was taken in April 1984 by the Israeli prime minister to halt all digging in the tunnel.[202]

In 1991 or 1992 one of the pillars in one of the large, vaulted rooms which form the foundations of the Madrasa al-Tankaziya was cut into to the extent of more than one meter during work in the vaulted rooms below the madrasa, at the beginning of the tunnel.[203] The pillar was cut in order to expose one of the stones used to build the Herodian Temple.[204] The madrasa is built on top of a variety of vaulted rooms dating from various periods since Roman times. Although Professor Lemaire, the director-general of UNESCO's personal representative for Jerusalem concluded that the stability of the monument had not been endangered by the work, he commented:

> At the same time, this type of operation is clearly not consonant with the basic principles for the conservation of historic monuments and is therefore difficult to justify. Moreover, the visibility of the 'Wall' was not really impaired by the pillar in question.[205]

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202 UNESCO Ref. No. 120 EX/14, p. 9, para. 4.1.

203 See section 5.4.2.

204 UNESCO Ref. No. 140 EX/12, pp. 4-5, para. 4.

205 Report of the Director-General of UNESCO's Special Representative on Jerusalem. UNESCO Ref. No. 142 EX/14, p. 3, para. 1.1.

6. THE LEGAL CONSEQUENCES OF ISRAELI VIOLATIONS OF INTERNATIONAL LAW IN RELATION TO CULTURAL PROPERTY IN THE OCCUPIED PALESTINIAN TERRITORIES

As demonstrated in Section 3, Israel has violated international law in its treatment of cultural property in the OPT in various ways. This section will discuss the legal consequences of these violations, looking specifically at the question of restitution and compensation, as well as the question of prosecution.

6.1 Payment of Financial Compensation and Restitution of Cultural Property Removed from Occupied Territory and Payment of Financial Compensation

6.1.1 Customary International Law

Any breach of international law, whether customary international law or treaty law, by a state imposes international responsibility upon the delinquent state. If damage or loss results from such a breach, the state is under an obligation to make reparations.[206] The Permanent Court of International Justice has explained that:

> "[Such] reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[207]

Article 3 of the Hague Convention of 1907 specifically requires a delinquent state to make reparations for violations of the laws of war by requiring a belligerent party which violates the provisions of the Hague Regulations of 1907 to pay compensation.

If a state has damaged or destroyed cultural property in breach of international law, the form of reparation will normally be financial compensation. Damages will be calculated according to the principle cited

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[206] *Chorzow Factory Case* (1928) Permanent Court of International Justice, Series A No. 17, p. 29.

[207] *Ibid.* p. 47.

above in the *Chorzow Factory Case*. For example, if a state has illegally damaged or destroyed an historic monument, damages would have to cover the cost of repairing or building the monument, in addition to compensating any reasonably foreseeable consequential loss, for example, the cost of renting alternative accommodation. Although it is unusual for reparation to take the form of restitution in kind, this type of remedy has been seen as appropriate when cultural property has been removed from a state in violation of international law, particularly where an occupier has seized cultural property from occupied territory during an armed conflict.[208] All the peace treaties signed at the end of World War I included clauses requiring the restitution of property seized by occupying armies.[209] On the question of cultural property, for example, the Treaty of Versailles of 1919 required the German government to restore to the French government "the trophies, archives, historical souvenirs, or works of art carried away from France by the German Authorities in the course of the war of 1870-71 and during this last war, in accordance with a list which will be communicated to it."[210]

In reaction to Germany's systematic plunder of property in the territories which it occupied during World War II, the Allies issued the Declaration of London in 1943, a formal warning to all persons, including those in neutral states, that the Allies reserved the right to declare invalid any transfer of property which had been situated in the territories under the occupation of the Axis powers or which had belonged to the residents of these territories, regardless of whether the transfer had taken the form of open looting or plunder, or of a transaction apparently legal in form. The particular significance of the declaration was that it sought to effect restitution of property which had been removed from the occupied territories under duress, even if that property had at a later stage been acquired by a *bona fide* purchaser, who would normally be protected by civil law from a legal action for recovery of the property in question.

The principles contained in the declaration were implemented after the defeat of the Axis Powers in Allied-occupied Germany and Austria. The Allies also convinced neutral states, such as Switzerland, Sweden and Portugal, to implement the Declaration of London. In Germany, Austria, and these

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208 Ian Brownlie, *Principles of Public International Law*, 3rd ed., (Oxford: Oxford University Press, 1979) pp. 461-2 and Lyndel Prott and Patrick O'Keefe, *Movement*, Vol. 1 of *Law and the Cultural Heritage*, (London: Butterworths, 1989) p. 828.

209 Nahlik, "La protection internationale," p. 99.

210 Treaty of Versailles, article 246, in John H. Merryman and Albert Elsen (eds.), *Law, Ethics and the Visual Arts: Cases and Materials* Vol. I (New York: Matthew Bender, 1979) p. 89.

neutral states, property could be recovered if it had been acquired under duress, even if it was in the hands of a bona fide possessor. A person who had acquired the property in good faith could apply to the government for compensation if restitution was ordered against him. The principles of the Declaration of London were also included in the peace treaties signed following World War II. The five peace treaties signed in Paris on 10 February 1947 with the Axis powers, except for Germany, make provision for restitution of property of the United Nations and its nationals which had been removed from other states.[211]

The Second Gulf War provides the most recent example of an insistence on restitution of cultural property and cultural reparations at the close of armed conflict. After the defeat of Iraq, the Security Council set down conditions for a definitive end to hostilities in Resolution 686 of 2 March 1991, including express conditions for the return of all Kuwaiti property seized by Iraq and Iraq's acceptance of its liability under international law for any loss, damage, or injury arising in regard to Kuwait and third states, and their nationals and corporations as a result of the invasion and occupation of Kuwait by Iraq.[212] Under the supervision of the United Nations Return of Property of Unit, 25,082 museum items from Kuwait's Dar al-Athar al-Islamiya and its National Museum were returned to Kuwait.[213]

6.1.2 The Hague Protocol of 1954

State practice clearly indicates that states which remove cultural property from an occupied territory in contravention of international law are under a legal duty to return that property. The Hague Protocol of 1954, which deals with the removal and restitution of movable cultural property, establishes similar rules to those contained in customary international law.

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211 Nahlik, "La protection internationale," p. 111. See Italian Peace Treaty, article 75; Bulgarian Peace Treaty, article 22; Hungarian Peace Treaty, article 24; Romanian Peace Treaty, article 23; and Finnish Peace Treaty, article 24 in F. L. Israel (ed.), *Major Peace Treaties of Modern History 1648-1967* Vol. 4 (New York: Chelsea House Publishers, 1967) pp. 2421, 2525, 2553, 2585, and 2615.

212 UN Security Council Resolution No. 686 of 2 March 1991 sub-paras 2(b) and (d) in *International Legal Materials*, Vol. 30 (1991), p. 567. See also Patrick Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)* (Paris: UNESCO, 1993) p. 96.

213 Report of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation on its Activities (1991-1993). UNESCO Ref. No. 27 C/102, pp. 2-3.

Article 3 states:

> Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principles laid down in the first paragraph. Such property shall never be retained as war reparations.

A high contracting party is under an absolute duty to return cultural property exported from occupied territory in violation of article 1 of the protocol. The obligations arising between states are clear, but the protocol is almost silent on the complex questions of private law which may arise in certain cases of restitution. It is clear from article 3 that, regardless of the wishes of the legal owners, all items of cultural property must under the terms of the protocol be returned to the territory from which they were removed. The only private law issue addressed by the protocol is the question of financial compensation for *bona fide* possessors: Article 4 requires the occupying power to pay an indemnity to possessors in good faith of cultural property which has to be returned.

It should be noted that article 3 requires property to be returned to "the competent authorities of the territory previously occupied." This is an important clarification. Under the terms of the protocol, therefore, restitution will not necessarily be effected in favor of the high contracting party which exercised *de jure* or *de facto* control of the occupied territory prior to occupation. As Thomas Fitschen explains, the phrasing "competent authorities" was used deliberately by the drafters of the Hague Protocol of 1954:

> Having in mind the political situation in Europe after the war, the drafters of paragraph 3 did not give this right simply to the "State" from which the objects came, because that would have met difficulties in cases of annexation of the respective territory or parts of it by another State, of continued occupation after the cessation of hostilities, or of lack of recognition by other States of the government claiming to

exercise legitimate authority over that territory.[214]

The possibility is envisaged in article 3 that, following the withdrawal of a military occupier, a new authority other than the ousted state may exercise control. In such a case, the military occupant is under an obligation to restore cultural property which has been removed to the authorities exercising control in that territory, not to the ousted state.

On the basis of the above it is clear that Israel is under a duty to pay compensation for the destruction and damage of cultural property. International law also requires Israel and other states who hold cultural property from the OPT to return such property at the end of the conflict to the authorities in control of the OPT. This requirement continues to apply even if the authorities who are in control of the OPT at the end of the conflict are not the same authorities who controlled the OPT prior to 1967.

6.1.3 The Israel-Egypt Agreement of 1993 for the Return of Cultural Property from Occupied Egyptian Territory

On 21 January 1993, Dr. Kamal Fahme Ibrahim, head of Egypt's Department of Antiquities, and Amir Drori, head of the IAA, signed an agreement whereby Israel undertook to return all items which had been excavated and removed from the Sinai during Israel's occupation of that area of Egyptian territory between 1967 and 1982.[215] The material provisions of the agreement stated:

> It was agreed between the delegation and the Israeli Antiquities Authority, that all artifacts and finds from the Sinai will be returned to Egypt within the next two years and not later than December 31, 1994.
>
> Those artifacts which have been processed and documented, will be returned to Egypt within the next two months.[216]

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214 Fitschen, "Licit International Art Trade," pp. 127, 131.

215 "First Sinai Treasures Returned to Egypt," *The Jerusalem Post*, 22 January 1993, p. 16.

216 Einhorn, "Restitution of Archaeological Artifacts," p. 142.

The agreement resulted in the return to Egypt of thousands of artifacts excavated in approximately 60 separate excavations during the period of Israeli occupation of the Sinai. According to media reports, the material returned to Egypt included three tombstones from the site of a Byzantine fishing village on the Bardiwill Lagoon in northern Sinai. These artifacts had been acquired by Moshe Dayan and were later sold to the Israel Museum.[217]

The Israeli authorities also handed over to the Egyptian government the results of a survey which had been carried out by Israeli archaeologists of the archaeological sites of northern Sinai.[218] There is no explicit obligation to hand over archaeological records in international law, although such a course of action is endorsed by article 32 of UNESCO's Recommendations on International Principles Applicable to Archaeological Excavations of 1956.

Statements from organs of the Israeli government as to whether Israel considered itself to be under a legal obligation to return these antiquities have been contradictory. Both Egypt and Israel were parties on the outbreak of the 1967 War to the Hague Convention and its Protocol of 1954.[219] The IAA clearly regarded Israel as being under such an obligation. Clear confirmation of the IAA's position came in a press release issued following the return of the final batch of artifacts to Egypt in December 1994. It stated:

> According to the January 1993 agreement between the IAA and the Egyptian Archaeology Authority, that in light of the latest peace agreements, and in accordance with the 1954 Hague Convention, all archaeological artifacts excavated in Sinai by Israeli archaeologists between the years 1967 and 1980 will be returned to Egypt.
>
> This marks the first time any country in the world is returning antiquities in accordance with the Hague Convention to their country of origin, after taken or excavated. The IAA hopes other countries will follow in honoring this convention.[220]

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217 Abraham Rabinovich, "Sinai Treasures Going Back to Egypt," *The Jerusalem Post*, 30 March 1993, p. 12.

218 *Ibid.*

219 Egypt ratified the Hague Convention and Protocol of 1954 on 17 August 1955.

220 IAA Press Release, "Sinai Antiquities Returned to Egypt," 28 December 1994. For discussion see Lapidoth and Hirsch, "International Law," p. 516.

By contrast, in a letter to al-Haq, a representative of the Israeli Ministry of Foreign Affairs stated that Israel did not regard itself as being under a legal obligation to return the artifacts:

> ... the Agreement for the Return of all Material Excavated by Israeli archaeologists in those parts of the Sinai occupied by Israel between 1967-1982, has been signed by Israel due to the principle of reciprocity, and not because it regards itself as bound by the Hague Convention and its Protocol of 1954, that is because of the fact that, as you probably know, the Hague Convention is not dealing with the return of those materials [*sic*] excavated by Israeli archaeologists but is dealing with their preservation by the Israeli authorities at the time of war.[221]

The Israeli Ministry of Foreign Affairs' stated position that it does not regard Israel as legally bound to return cultural property because the Hague Convention and its Protocol of 1954 only relate to the preservation of cultural property during armed conflict and do not require the return of cultural property is untenable. As is stated by Lapidoth and Hirsch, "The *primary* aim of the Protocol to the 1954 is to prevent the exportation of cultural objects from occupied territories" [italics added].[222] As has been discussed above, by acceding to the protocol, Israel has clearly undertaken to return to the authorities of previously occupied territory any cultural property which had been exported into Israel from that territory.

Regardless of Israel's position as to whether it considers itself to have been under a legal obligation to return all items of cultural property excavated in Sinai, Israel's actions provide a useful precedent for representatives of the Palestinian people in any attempt to recover items of cultural property removed by Israel from the OPT. The precedent is particularly helpful since Israel not only returned material possessed by the Israeli government but also returned artifacts in private ownership.

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[221] Letter to al-Haq from Pinchasov Stel of the Department of International Affairs, Israeli Ministry of Foreign Affairs, 28 July 1995.

[222] Lapidoth and Hirsch, "International Law," p. 516.

6.2 Prosecution

There are three separate bases for the prosecution of persons for cultural war crimes committed in the OPT: the Hague Convention of 1907 and its Regulations, the Fourth Geneva Convention of 1949, and the Hague Convention of 1954.

6.2.1 The Fourth Hague Convention and Regulations of 1907

The original legal basis for prosecution for violations of the international law of cultural property applicable in armed conflict derived from the discretionary right of belligerent states to enforce the laws of war against persons within their jurisdiction including enemy military personnel, enemy civilians, and other persons of any nationality.[223] The Hague Convention and Regulations of 1907 transformed this discretion into a duty to prosecute certain types of violations of the laws of war, including violations relating to cultural property. Article 56 of the Hague Regulations not only forbids seizure, destruction, or willful damage of cultural property, it also requires that such acts be made "the subject of legal proceedings".

Germany's commission of war crimes on a massive scale during World War II, including vast numbers of cultural war crimes, led to the establishment in 1945 of the Nuremberg Tribunal by France, the Soviet Union, the United Kingdom, and the United States in order to bring the major war criminals to justice before an international tribunal.[224] Other war criminals were prosecuted before national military tribunals established in the countries where their crimes had been committed. Allied Control Council Law Number 10 of 1946 authorized the states occupying Germany to prosecute persons for war crimes in their respective areas of occupation.

Article 6(a) of the Nuremberg Charter defines war crimes as "violations of the laws or customs of war" and specifies certain types of violations including "plunder of public or private property; wanton destruction of cities, towns or villages; or devastation not justified by military necessity."

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223 Lyal Sunga, *Individual Responsibility for Serious Human Rights Violations* (Dordrecht: Martinus Nijhoff, 1992) p. 19, and War Crimes Inquiry, *Report of the War Crimes Inquiry* (London: Her Majesty's Stationery Office, 1989) p. 45.

224 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (The Nuremberg Charter) in Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts* (Dordrecht: Martinus Nijhoff, 1988) p. 911.

Although cultural war crimes are not specified in the charter, the Nuremberg trials and other military tribunals conducted at the time make it clear that deliberate or reckless destruction or damage to cultural property and the looting or theft of such property during armed conflict and occupation are war crimes.[225] The Nuremberg Tribunal is significant as the first international effort to enforce humanitarian law and as the first attempt to establish that international responsibility for war crimes rests not only on the state but also on individuals.

A number of the defendants tried by the Nuremberg Tribunal were accused of committing cultural war crimes, including pillage and destruction of property, although no one was accused exclusively of the commission of this type of crime.[226] The tribunal's judgment discusses at some length Germany's systematic pillage of thousands of items of cultural property in the occupied territories through the Einsatzstab, a department established by the German government to collect and "protect" works of art from across Europe.[227] The tribunal rejected the defendants' arguments that these seizures were for the purpose of protecting and preserving these items, finding that they were intended to enrich Germany. Einsatzstab head Alfred Rosenberg, was found guilty expressly of being "responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe."[228] Martin Bormann was also found to have been involved in art confiscation.[229] Other defendants at the Nuremberg trials, Hermann Goering, Hans Frank, and Arthur Seyss Inquart, were implicitly found guilty of pillage of cultural property.[230]

Before Polish war crimes tribunals, Wilhelm Palézieux, Joseph Buhler, Ludwig Fischer, and Arthur Greiser were convicted *inter alia* for war crimes related to cultural property.[231] Palézieux, a German official who supervised the removal from Poland of confiscated works of art during the advance of

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225 Boylan, Review of the Convention, p. 91.

226 Nahlik, "La protection internationale," p. 117.

227 The Nuremberg Trial. Federal Rules Decisions, Vol. 6, pp. 69, 122-3.

228 Ibid. p. 157.

229 Ibid. p. 177.

230 Ibid. pp. 148, 158, 181.

231 Nahlik, "La protection internationale," pp. 116-18.

the Soviet troops was prosecuted and convicted in Poland. [232] Buhler held a senior position in the German civil administration in Poland and was convicted of "systematic destruction of Polish cultural life and looting of Polish art treasures" as well as seizure of both public and private property.[233]

As Cherif Bassiouni states:

> The prosecutions of the major Nazi war criminals firmly established confiscation, destruction and damage to cultural property as a war crime subject to prosecution and punishment, and provided the first truly international enforcement of the international law protection of cultural property.[234]

There has a been a great deal of controversy as to whether the Nuremberg Charter can be regarded *per se* as a precedent establishing individual responsibility for war crimes.[235] This debate will not be explored here. In 1946 the UN General Assembly unanimously passed a resolution affirming "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the tribunal."[236] It can be stated with confidence that states now regard the principles of the charter as reflective of customary international law. It can, therefore, be said that certain types of violations of the international law of cultural property in armed conflict are war crimes and individuals are responsible in international law if they commit such crimes.

In 1993 the UN Security Council established an international war crimes tribunal to investigate violations of international humanitarian law in former Yugoslavia.[237] The international tribunal is empowered *inter alia* to

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232 Nahlik, "La protection internationale," p. 116.

233 *Trial of Dr. Joseph Buhler* (Case No. 85) *UN War Crimes Commission Law Reports*, Vol. XIV, p. 23.

234 Cherif Bassiouni, "Reflections on Criminal Jurisdiction in International Protection of Cultural Property," *Syracuse Journal of International Law*, Vol. 10 (1983), pp. 218, 292.

235 Sunga, *Individual Responsibility*, pp. 32-5.

236 UN General Assembly Resolution 95(1), 11 December 1946.

237 UN Security Council Resolution 808, 22 February 1993.

prosecute persons who violate the laws or customs of war, including "seizure of, destruction, or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science."[238] The inclusion of a provision on cultural war crimes, omitted from the Nuremberg Charter, reflects heightened international concern, stimulated by the Second Gulf War and the conflict in former Yugoslavia, over destruction and appropriation of cultural property.

6.2.2 The Fourth Geneva Convention of 1949

As stated above, the Fourth Geneva Convention of 1949 prohibits pillage and the destruction of any real or personal property except where such destruction is rendered absolutely necessary by military operations. Article 147 specifies that extensive destruction and appropriation of property constitutes a grave breach of the convention.

6.2.3 Obligation to Prosecute or Extradite for War Crimes or Grave Breaches of the Fourth Geneva Convention of 1949

In customary international law, damage, destruction, and misappropriation of cultural property constitute war crimes, *i.e.* international crimes to which the theory of universal jurisdiction applies.[239] States are required to prosecute or extradite persons alleged to have perpetrated such crimes and to provide judicial assistance and cooperation in investigation. Similar provision is made under article 148 of the Fourth Geneva Convention of 1949 which requires states parties to provide effective penal sanctions against persons who commit grave breaches or order their commissions. States must prosecute persons who commit grave breaches, regardless of their nationality, or alternatively hand them over to another state for prosecution. They must also provide judicial assistance and cooperation in bringing such persons to justice.

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238 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of Former Yugoslavia in *Netherlands Quarterly on Human Rights*, Vol. 11 (1993), p. 503.

239 Bassiouni, "Reflections on Criminal Jurisdiction," p. 286.

War crimes and grave breaches of the Geneva Conventions give rise to universal jurisdiction. All states must punish war crimes and graves breaches regardless of where they were committed, and regardless of the nationality of the perpetrator or the victim.

6.2.4 The Hague Convention of 1954

Article 2 of the Hague Convention of 1954 states:

> The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal and disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the Convention.

Article 28, though concise, does make it clear that states parties must make violations of the Hague Convention of 1954 crimes under their own national laws. The provisions of the Hague Convention of 1954 concerning prosecution for cultural war crimes however are much weaker than the requirements of customary international law or the Fourth Geneva Convention of 1949, especially as article 27 does not specify which types of breaches should attract criminal sanctions.

Article 28 requires the issuing of orders to carry out violations to be criminalized. It is also clear that states parties are required to take measures against persons who violate the Hague Convention of 1954 even if they are nationals of another state. Article 27 contains no general guidance as to the basis on which a state can claim to exercise jurisdiction in relation to cultural war crimes. In contrast to the Fourth Geneva Convention of 1949 and the rules of customary international law, article 27 does explicitly state that states can exercise universal jurisdiction.

6.2.5 Obligations on Israel and Other States

The above makes clear that Israelis are obliged to prosecute persons who order or commit extensive destruction or appropriation of cultural property. Other states are also required to bring criminal proceedings against persons who perpetrate such crimes or to extradite them for prosecution. All states

are obligated to provide judicial assistance and cooperation in the investigation of such crimes—an important obligation in relation to crimes involving movable cultural property. The obligations of third-party states in relation to cultural war crimes are particularly important as items of movable cultural property may be situated outside Israel.

Prosecutions for cultural war crimes are not without precedent. As we have seen, a number of persons were prosecuted for crimes of this type committed during World War II. It is also possible that persons will be indicted before the international tribunal established to try war crimes committed in former Yugoslavia.

7. CONCLUSIONS

It should be remembered that, in the absence of a final peace settlement, Israel remains a military occupant in the OPT, and, therefore remains bound by provisions dealing with cultural property in the Hague Convention and Regulations of 1907, the Fourth Geneva Convention of 1949, and the Hague Convention and Protocol of 1954. Both Israel and the PNA must also comply with the provisions of the Oslo II Agreement concerning archaeology.

Israel, therefore, remains under an obligation not to remove cultural property from the OPT. As a consequence, museums in Israel and elsewhere who are ICOM members must refrain from acquiring or accepting loans of artifacts originating from the OPT including East Jerusalem. Such actions continue to contravene the ICOM Code of Professional Ethics of 1986.

The upcoming negotiations on final status issues between Israel and the PLO provide an opportunity to address the violations of international law which have been committed by Israel over the years in the OPT in relation to cultural property. If the outcome of the negotiations is to be based on principles of international law, Israel must transfer all movable cultural property removed from the OPT and located inside Israel to the authorities in charge of the OPT. Any final settlement must also address the question of compensation for damage and destruction of cultural property.

International law requires Israel to transfer items of cultural property taken from the OPT, even if this material is in the hands of private institutions or individuals. Israel should be required to make positive efforts to search for cultural property that has been transferred illegally to Israel, particularly property which has been removed in violation of the laws in force in the OPT. Although not strictly required under international law, it would be highly desirable if Israel followed the precedents established in the Israeli-Egyptian agreement of 1993 and the agreement signed between Israel and the PLO in 1994, and transferred all records and reports of excavations conducted in the OPT since 1967. A full appreciation of archaeological artifacts returned to the OPT will only be possible if comprehensive information is also available about their discovery. Such information is also highly valuable for its own sake, as it increases understanding of the past.

Special consideration will have to be given in the negotiations to the fate of the Palestine Archaeological Museum and its valuable collections. This issue raises unique problems. The museum was designed to house the antiquities of the entire area of British Mandate Palestine. Should its unique collection

come under the exclusive supervision of whatever authority exercises sovereignty in East Jerusalem as a result of the final status negotiations? Should the collection be divided between the Israeli and Palestinian authorities? Should the collection be retained intact, and *in situ*, administered by a joint Israeli-Palestinian authority?

Any agreement negotiated between Israel and the PLO should make provision for the possibility of return of items of cultural property even after a final settlement is signed. It is highly unlikely that all items of cultural property from the OPT, particularly items in private collections, currently located inside Israel will be identified before an agreement is signed. Items of cultural property which were removed from various countries during World War II and which belonged either to states or to private individuals continue to be identified more than 50 years later. Any agreement needs to make clear that items of cultural property identified after the signing of the agreement should be returned.[240]

It has been argued that the operation of the Hague Protocol of 1954 in the Arab-Israeli context is unsatisfactory because it requires the transfer of artifacts which shed light on Jewish heritage out of the State of Israel, which as a Jewish State, is their natural home.[241] It is undeniable that some, although by no means all, artifacts which have been removed from the OPT can be perceived as shedding light on Jewish culture and tradition. Such artifacts can be regarded equally well as being relevant to the material culture of Palestine and, therefore, of interest to all people living within that area whatever their national or religious identity. In either case, international law decrees that cultural property should not be removed from occupied territory, and, if that rule is breached, that it should be returned. One of the objectives of this rule is to prevent an occupying power from unfairly exploiting its position to remove culture property unilaterally. The rule prevents any change in the *status quo* existing immediately prior to occupation.

At the same time, the operation of the Hague Protocol of 1954 does not prevent Israel and the authorities responsible for the OPT from negotiating

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240 Lyndel Prott reports that a "plethora of demands [are] now emerging for the repatriation of objects displaced during World War II.... In the United Kingdom about four years ago, the Netherlands government claimed a painting, part of a collection which had found its way into Goering's collection and had disappeared after the war. It arrived for sale in London and a court returned it to the Netherlands government. A similar case in the United States was settled about the same time." ("Repatriation of Cultural Property," *University of British Columbia Law Review* (Special Edition) (1995) pp. 229, 235).

241 Einhorn, "Restitution of Archaeological Artifacts," pp. 145-147.

bilateral agreements following a peace settlement to arrange for the display of material from the OPT in Israel or vice versa. The sides could agree to transfer property or to loan artifacts on either a temporary or permanent basis. They could agree to guarantee access to their museums for the others' nationals. Such efforts could only be of positive benefit. As the preamble of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property of 1970 states:

> ... the interchange of cultural property among nations for scientific, cultural, and educational purposes increases the knowledge of the civilisation of Man, enriches the cultural life of all people and inspires mutual respect and appreciation among nations.[242]

Efforts to achieve a settlement of these disputes at the level of bilateral negotiations between Israel and the representatives of the Palestinian people does not preclude individual efforts by museums and collectors who are in possession of artifacts which originate from the OPT to resolve these questions. Such efforts may be even more successful, since, unlike official negotiations, they can take place without the glare of publicity. As Lyndel Prott states, "Such issues are highly emotive and the process is not necessarily assisted by high-profile activity and sensational press coverage."[243] It should be noted, however, that under Israeli law, the IAA has first option to purchase an antiquity which a museum proposes to transfer to another person or institution.[244] Even if Israeli museums wish to transfer antiquities from the OPT in their possession to the PNA, this legal provision may pose an obstacle if the IAA opposes transfer.

Obligations concerning cultural property originating from the OPT do not just fall on Israel, they also devolve on all other parties to the Hague Convention and Protocol of 1954. These states must verify if cultural property from the OPT is located in their territory and return any such property at the time of any peace settlement.

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242 Preamble to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970.

243 Prott, "Repatriation of Cultural Property," p. 238.

244 Antiquities Law 1978, section 26.

In order to pursue their claims effectively, the PLO and PNA need to work on compiling a comprehensive inventory of all artifacts which have been removed from the OPT for the purposes of claiming restitution, as well as detailed information on cultural property which has been damaged or destroyed, for the purposes of claiming compensation. Given UNESCO's relatively active role in relation to the protection of cultural property in the OPT, the PLO and PNA should consider whether UNESCO bodies, such as the executive board, general conference or Intergovernmental Committee on Return of Cultural Property can be used to advance its claims. More work also needs to done on utilizing Israeli law for the return of cultural property to the OPT.

The legal case for the provision of compensation for destruction and damage of cultural property in the OPT and for the return of cultural property removed illegally from the OPT is a convincing one. These questions are, of course, only one of the many issues which will be discussed during the Israeli-Palestinian negotiations on the final status. Seen in this context, the question may seem to be of minimal importance. It should not be forgotten, however, that the material which has been removed by Israel represents an extremely important educational and economic resource. Although it may be tempting to use the question of cultural property as a bargaining chip to obtain Israeli concessions on other matters, this tactic should be avoided. The material in question is unique and irreplaceable.