PROTECTING THE PAST FOR A BETTER FUTURE:
PROTECTING PALESTINIAN
CULTURAL HERITAGE

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THESIS ABSTRACT

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Cultural heritage is fundamentally important to humanity. Societies around the world have recognized this for centuries. However, in the context of war, damage to cultural heritage goes unnoticed until it is too late.

Palestinian cultural heritage is disappearing at a rate of 12,000 pieces per year. If this destruction continues, there may not be any cultural heritage left for future generations. This paper examines the current legal framework in place for the protection of Palestinian cultural heritage in light of the biggest threats to it, in order to determine if there is an adequate legal framework in place for the protection of Palestinian cultural heritage. Then, considering how many cultural heritage pieces have already been illicitly exported from the Palestinian territories, I examine the legal duties of the Palestinian government, Israeli government, and International governments that may aid in the restitution of Palestinian cultural heritage.
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PROTECTING THE PAST FOR A BETTER FUTURE

Why is cultural property important? The best answer to this question is found in the preamble to the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954:

**Being Convinced** that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

**Considering** that the preservation of cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;

As the 1954 Convention states, Cultural Heritage is important for all humanity. A keen awareness of the past and a present rooted in tradition is highly important for peoples across the globe. Understandably, violations against cultural heritage are more discrete and seemingly less urgent than most violations against human rights. However, they are vital to a culture’s survival. After the dust of war has settled and people begin to recreate their lives, it is their Cultural Heritage that gives them a framework within which to move forward.

The Israeli-Palestinian conflict has been dragging on for decades. The damage to people on both sides has been going on for too long. A great deal has been written about this conflict, however, what is rarely covered is how the cultural heritage of Palestine is being irreparably damaged by the conflict. In this paper, I examine the current legal framework in place for the protection of cultural heritage in Palestine in order to determine if current laws are adequately protecting one of Palestine’s most important resources, its

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3 Gelvin, *The Israel-Palestine Conflict*, supra.

cultural heritage. I then analyze what legal duties of restitution apply to Palestinian cultural heritage that has already been displaced.

While I will be focusing on the protection of Palestinian cultural heritage, it is very important to note that cultural heritage across the world is and has been under threat for decades. The biggest threats to cultural heritage include war-time destruction and confiscation, degradation, colonialism and imperialism. Recently, Daesh (ISIS) has brought the issue of cultural heritage destruction to the forefront of the global community’s awareness. However, the issue is not new as indicated by the many ongoing claims for restitution, return, and repatriation of cultural heritage that are currently ongoing throughout world. The most famous of these claims for restitution, return, and repatriation are claims by India and Pakistan for the return of the Koh-i-Noor diamond from Britain, requests by Greece for the return of the Parthenon Marbles from Britain, numerous claims for the return of Jewish property stolen by the Nazis in WWII, and the Egyptian governments demand for the return the Rosetta Stone also now housed in Britain.56


I. HISTORY

Civilization has existed in what is today called Palestine and Israel since the 12th Century BC. This paper however, will examine events and laws beginning in 1516 with the Ottoman Empire’s control of the Greater Syrian region, including present day Israel and Palestine, which has had a strong influence on the regulation of cultural artifacts today.

The Ottoman Empire ruled the Greater Syrian Region from 1516-1918. The Ottomans allied with the losing Central Powers in WWI and, at war’s end, a majority of the Empire’s territory was seized and given to the League of Nations to be divided up among the winning Allied Powers.

Through this League of Nations division process of the Greater Syrian Region, Britain was given control over the territory collectively known as the British Mandate, which is today comprised of Israel, Palestine and Jordan. British control over the mandate was not peaceful. In 1946, the Hashimite Kingdom of Jordan gained its independence from Britain. Then, in 1947, the rising level of violence combined with domestic issues caused Britain to wash its hands of the Jewish-Arab territorial dispute over present day Israel and Palestine and hand the territory over to the newly created United Nations.

In 1947, the prevailing theory of how to deal with nationalist driven territorial disputes was to create partition plans. Thus, the UN created the 1947 partition plan for the

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7 Philistine People, Encyclopaedia Britannia (March 18, 2015), http://www.britannica.com/EBchecked/topic/456536/Philistine


10 Bickerton & Klausner, supra.

11 Kersel, Fractured, supra.


13 Id.

14 Bickerton & Klausner, supra.
British Mandate, which laid out a proposal to split the territory into two separate states
Israel and Palestine.\textsuperscript{15} The 1947 Partition plan was readily accepted by the Jews but rejected
by the Arabs. Despite Arab rejection of the partition plan, Israel declared independence
and was almost immediately granted statehood recognition by the International
community.\textsuperscript{16} Israel’s unilateral declaration of independence sparked the 1948 Arab-Israeli
War in which a coalition of Arab States attacked the newly formed Israeli state. Despite
the odds, the newly formed State of Israel survived and won the war, while managing to
maintain control of the territory laid out for it in the partition plan as well as gain a
significant portion of the land laid out for Palestinians in the partition plan.\textsuperscript{17} The War was
officially ended with the signing of the 1949 Armistice Agreement, in which Jordan took
control of what is today the West Bank. Jordanian rule, over the West Bank and East
Jerusalem, lasted almost twenty years. However, in 1967 what became known as the ’67
war, broke out between Israel and its Arab neighbors, Syria, Jordan and Egypt, which
resulted in the Jordan losing the West Bank to Israel.\textsuperscript{18}

At the end of the six days war of 1967, Israel gained the Golan Heights from Syria,
the West Bank and East Jerusalem from Jordan and Gaza and the Sinai Peninsula from
Egypt.\textsuperscript{19} Eventually, in 1979, Egypt and Israel signed a peace treaty in which Israel agreed
to give the Sinai Peninsula back to Egypt. However, Israel, to this day maintains control
over the West Bank, East Jerusalem, and the Golan Heights.\textsuperscript{20} The UN General Assembly
has declared Israel to be an occupying military force in the West Bank and East
Jerusalem.\textsuperscript{21}

\textsuperscript{15} Goldschmidt, supra.

\textsuperscript{16} Id.

\textsuperscript{17} Bickerton & Klausner, supra.

\textsuperscript{18} Id.

\textsuperscript{19} Id.

\textsuperscript{20} Salah Hussein Al-Houdalieh, Archaeological Heritage and Related Institutions in the
Palestinian National Territories 16 Years After Signing the Oslo Accords, 2 Present Pasts 1, 31
(2010).

There has been considerable violence between Israelis and Palestinians during the many years of the Israeli occupation of Palestine\(^{22}\) and at times the international community has stepped in and tried to draw up treaties that would create peace as well as end the Israeli occupation of Palestine. The most influential set of treaties were the Israel-PLO Accords (Oslo I), signed in 1993, and the Taba Accords (Oslo II), signed in 1995.\(^{23}\)

The importance of these two accords cannot be understated. Oslo I marked the first time both the PLO and Israel mutually recognized each other and set out a Declaration of Principles, which laid down a road map that was intended to lead to Palestinian control of the West Bank and Gaza. Two key features of the road map were the recognition of the Palestinian Liberation Organization (PLO) as the legitimate representative of the Palestinian people\(^ {24}\) until elections could be set up and the division of negotiations into interim issues and permanent or final status issues. Oslo II, then gave more control and independence to the Palestinian Authority (PA) and set up a system of power sharing between Israel and the PA based on the territorial divisions.\(^ {25}\) These divisions included Areas A, B, and C (See Appendix A). Area A is characterized by full Palestinian Authority (PA) control over both civilian and military activity. In area B, the PA is in control of civilian life while Israel is in control of military activity. Finally, in area C, Israel has full control over civilian and military life.\(^ {26}\) The stated goal of both parties was that once these

\(\text{\footnotesize{22 In this paper all references to the state of Palestine are referring to the territories of Gaza, East Jerusalem and the West Bank, along the green line. However, given the different governments in power in these three locations the laws for the protection of cultural heritage are different in each. Thus, this paper will only address the legal frame work for the protection of Palestinian cultural heritage located in or originating from the West Bank.}}\)

\(\text{\footnotesize{23 Bickerton & Klausner, supra.}}\)

\(\text{\footnotesize{24 The PLO was formed in 1964 and led by Yasser Arafat soon thereafter. It is a nationalist movement and has been recognized as the sole representative of the Palestinian people for the purpose of international relations. (http://www.miftah.org/Display.cfm?DocId=9055&CategoryId=4 )The Palestinian Authority (PA), was the official government of the Palestinian territories set up in 1994 as part of the Oslo Accords. Within the Palestinian Authority there are numerous political parties two of the most well-known are Fatah and Hamas. Fatah was the party of Yasser Arafat and is the party of Mahmoud Abbas, the current PA President and PLO Chairman. Hence, the PLO is often associated with Fatah. However, technically the PLO includes Palestinians from various political parties. (http://www.pna.gov.ps/index.asp).}}\)

\(\text{\footnotesize{25 Oslo II, supra note 53.}}\)

\(\text{\footnotesize{26 Id.}}\)
divisions were set up, they could begin a slow transition from Israeli to Palestinian control over a five-year period. However, after the initial transition from full Israeli control of all of the West Bank to PA control of Area A and control of civil matters in Area B, no further transition occurred. Israel is still in control of Military issues in Area B and in full control of Area C. Unfortunately, these divisions are one of the biggest problems when it comes to protecting Palestinian cultural heritage as will be discussed later in the paper.

The Palestinian Authority is still the government in Palestine. After the Oslo accords Yasser Arafat was elected to the PA Presidency and Fatah members held the majority of government positions in the PA. Upon Arafat’s death in 2005, Mahmoud Abbas, now chairman of the PLO and member of Fatah, took his place as President of the PA. During the 2006 Palestinian parliamentary elections Fatah lost its majority in the PA to Hamas. After the Election, Abbas declared a state of emergency in Palestine and refused to recognize the Hamas representatives. However, Hamas was able to physically take control of the Gaza strip, where they are still in power today, while Abbas and Fatah have maintained control of the West Bank. The West Bank is still technically under a state of emergency, presumably because of violence and political turmoil in Palestine, which has prevented elections from occurring since 2007. Due to the Palestinian Authority’s structure as a parliamentary democracy, the lack of elections and political infighting between Hamas and Fatah has caused the government to effectively freeze.

27 Bickerton & Klausner, supra.

28 Id.

29 Bickerton & Klausner, supra.
II. CULTURAL PROPERTY IN PALESTINE

In the Palestine, archaeological digs are the main source of cultural heritage discovery. Archaeology can be particularly political and divisive. This is especially true when you have two peoples fighting to shape their national and historic identity in connection with a particular territory. As Nadia Abu Al-Haj stated;

Archaeology is understood to be heritage, artifacts to embody “cultural roots,” something about which every Jew in Palestine and later, in Israel clearly wanted to know. While Al-Haj made this statement in regard to why Jewish people living in Palestine and Israel were, and are, so fascinated by archaeology, the same can be said about Palestinians. Given the historical context of the argument over who has rights to the territories currently called Israel and Palestine, all archeological digs have political implications. Each side co-ops historical finds to justify their own narrative and superior right’s to the lands they share.

A. Facts about Cultural Property in the West Bank

Civilization has existed in Palestine for centuries. Thus Palestine is one of the richest countries in the world in terms of archeological potential. In fact, digs in the West Bank commonly find artifacts from the Bronze age, Iron age, Persian-Hellenistic, Roman-Byzantine, Early Islamic-Ottoman and even prehistoric eras. It is estimated that there are at least 12,000 archaeological sites in the West Bank, with 40% of those sites in Areas A and B and 60% of the sites in Area C.

B. Current Threats to Cultural Property in the West Bank

Israel has full control over Palestinian cultural heritage located in Area C and indirect control, through control of movement and access, over cultural property in Area B. As stated, Area C alone contains roughly 60% of Palestine’s cultural property.

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33 Greenberg & Keinan, Present Past, supra.
Excavations of these cultural property sites are not uncommon. In fact, it is estimated that the Israelis have authorized roughly 1500 permits for excavations in Area C, mainly to their own Administrative Staff Officer who stores the antiquities found in a storeroom in East Jerusalem. There is no accountability for Israeli actions in Area C and many Israeli and Palestinian archeologists accuse the Staff Officer of leaving many of Palestine’s valuable cultural heritage sites vulnerable to destructive activities such as looting. As discussed below, looting is a number one cause of cultural heritage destruction in Palestine.

Israeli policies affect more than just the cultural heritage located in Area C. Israel has also negatively affected Palestinian cultural heritage by building the Separation Barrier, directly attacking historically or architecturally significant buildings during violent outbreaks between Israelis and Palestinians, and through its current Antiquity Law. It is commonly accepted that the Israeli wall is not built entirely on the green line (the 1949 Armistice treaty line). Instead, in several places the wall dips deeply into Palestinian territory. Due to these dips, it has been estimated 40%, of the total 60% of Palestinian cultural heritage sites located in the West Bank, are now located on the Israeli side of the wall. One researcher has estimated that the building of the wall has destroyed around 800 heritage sites. Israel has also been known to destroy cultural heritage structures in its response to violent outbreaks between Israelis and Palestinians, as will be discussed in the case of Nablus. Finally, Israel’s Antiquities Law of 1978 allows for trade in antiquities and has in effect created a major incentive for Palestinians and Israelis alike to loot cultural heritage sites and then export them to Israel to be sold either on the black market or the legal market.

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34 Greenberg & Keinan, Present Past, supra.
37 Al-Houdalieh, Oslo, supra.
39 Al-Houdalieh, Political Crisis, supra.
After the signing of Oslo II, the Palestinian Department of Antiquities and Cultural Heritage (DACH) was tasked with the job of protecting the Palestinian cultural heritage in Area A and B which constitutes about 40% of all Palestinian cultural heritage. DACH is severely underfunded and ill-equipped to deal with the nearly 12,000 archaeological sites in the West Bank.\(^4\) It has since authorized 32 permits for archaeological digs.\(^4\) However, DACH has almost no enforcement power and the PA has yet to pass a law against the trade in antiquities.\(^4\)

The policies of both the Israeli government and the Palestinian Authority have allowed the looting of Palestinian cultural heritage. It is estimated that annually 120,000 artifacts are taken from cultural heritage sites in Palestine and exported to others to be sold.\(^4\) Both governments blame the other for not properly protecting cultural heritage sites but, due to the interwoven power structure, both governments are to blame.\(^4\) There have been three time periods in which looting increased substantially. First, immediately after the 1967 war when the economy was in ruins and people began to take up looting as a full time profession. The second and third spikes came after the first and second intifadas in 1987 and 2000 respectively. These sharp increases in looting of West Bank cultural property can be correlated with times of high unemployment.\(^4\) The majority of Palestinian looting can be traced back to locals who search for artifacts of value to sell to middlemen who then sell the artifacts to Israeli Antiquities dealers.\(^4\)


\(^4\) Al-Houdalieh, *Political Crisis*, supra.

\(^4\) Al-Houdalieh, *Political Crisis*, supra.

\(^4\) Schipper, *supra*, at 284.


\(^4\) Schipper, *supra*, at 282.

C. Historical Laws on Archaeology in Israel and Palestine

In order to understand present day Israeli laws governing archeology and cultural heritage objects in Palestine, it is necessary trace the laws of the previous occupying powers back to the Ottoman Empire.

Despite the fact that the Ottoman’s conquered the greater Syrian region in 1516, they did not enact laws dealing with the protection of cultural heritage resources or archaeological sites until 1874. However, starting in 1874, they passed three laws in fairly rapid succession, the second two being passed in 1884 and 1906. All of these laws were passed in an effort to protect cultural heritage resources. Collectively the laws required that any archeological dig apply for and be granted a license from the government. Additionally, any artifacts found during a state licensed dig were ultimately the property of the Empire as well as property of the National Museum in Constantinople, which was the mandated final destination for such items.

As mentioned above, the Ottoman Empire was dissolved due to its alliance with the Central Powers in WWI. Its territory in the Middle East was mainly split up between Britain and France, with Britain getting present day Palestine, Israel and Jordan in 1917. In 1920, Britain created the first ever department of Antiquities in Palestine. Then in 1929, it passed Antiquities Ordinance no. 51 which placed restrictions on the trade of antiquities, and laid out methods for excavation as well as for interpretation, and, interestingly, for acquisition by museums. Importantly, the Antiquities Ordinance no. 51 is still the basis for antiquity laws in Jordan, Palestine, and Israel.

After the war of 1948, Jordan gained control over what was finally referred to as the West Bank and East Jerusalem. Originally, upon taking over the West Bank and East Jerusalem, Jordan maintained the British Mandate’s Antiquities Ordinance of 1929.

\[47\] Al-Houdalieh, Oslo, supra.
\[48\] Al-Houdalieh, Oslo, supra.
\[49\] Kersel, Fractured, supra.
\[50\] Al-Houdalieh, Oslo, supra.
\[51\] Kersel, Fractured, supra.
However, as looting became more and more of a problem, Jordan repealed British Ordinance no. 51 and passed its own Temporary Law no. 51 on Antiquities in 1966. In reality the Jordanian law kept many of the same measures as the British Antiquities Ordinance. One significant change was that it declared all antiquities discovered in the West Bank to be Jordanian instead of British property. Other important elements of the Jordanian law included the creation of a council of experts on cultural property, which was mandated to meet with the Director of Cultural Antiquities. Then in 1967 Israel gained control of the West Bank and East Jerusalem after its resounding defeat of Jordan, Syria and Egypt in the ’67 War. This marked the end of Jordanian laws in the West Bank and the beginning of the current system of Israeli laws.

Under the current system, Palestinian cultural heritage is being destroyed or exported at an alarming rate. If the Palestinians are to ever have a state, they will need their cultural heritage in order to build their own narrative and cultural history. However more importantly, Palestinians as a people have a right to their own cultural heritage. Therefore, it is important to analyze the biggest threats to cultural heritage and the laws currently in place in regard to these threats to determine how better to protect this invaluable resource in the future.

52 Al-Houdalieh, Oslo, supra.

53 Greenberg & Keinan, Present Past, supra, at 17.
III. DESTRUCTION AND DIGGING OF PALESTINE’S ARCHAEOLOGICAL SITES

As discussed previously, Palestinian cultural heritage sites are threatened by both complete destruction and the high number of excavations taking place without the permission of the Palestinian Authority.

A. Accords and Laws Potentially Applicable to the Destruction and Digging of Archaeological Sites in the West Bank

There are three sources of laws that offer protections for cultural heritage in Palestine: international law, treaties, and domestic law on cultural property. In the case of Palestine, all three interact with each other to create a set of standards and enforcement mechanisms for the protection of cultural heritage from destruction and digging.

1. International Laws

Before delving into which international laws are involved in the protection of cultural heritage, it is important to point out that international laws, treaties and conventions generally only apply to states that have ratified the treaties. Thus the presence of an international law or convention on a topic does not necessarily bind a state to the obligations set out in the treaty unless the state agrees to be bound by them.54 This fact becomes particularly important when discussing Israel’s obligations to protect Palestinian cultural property under international law. Ordinarily, only a recognized state may ratify international conventions.55 Thus Palestine, because it has not been recognized as a state by the UN Security, cannot ratify most UN conventions.56 However, on November 23, 2011, Palestine was granted membership in UNESCO, a move that allowed Palestine to

54 The exception being if the treaty becomes customary law, in which case unless the State has been documented as a persistent objector they will be bound, whether or not they signed the treaty. See Lori F. Damrosch, Louis Henkin, Sean Murphy, Hans Smit, International Law Cases and Materials, (5th ed. 1980).


56 The 1933 Montevideo Convention on the Rights and Duties of States defines the legal requirements for statehood. It can be argued that Palestine meets these requirements, although the debate around this issue is more political than legal. It is widely accepted that the UN Security Council has not recognized Palestinian statehood due to the political interests of key players like the United States.
ratify any of the UNESCO conventions. Furthermore, Palestine, was granted “non-member state status” by the United Nations General Assembly in November of 2012 and, as such, is allowed to ratify conventions and hold other signatory states responsible for breaches of those conventions.\(^57\) In 2012 Palestine ratified six UNESCO conventions including the 1954 Convention for the protection of cultural property in the Event of Armed Conflict with Regulations for the Execution of the Convention(1954 Convention), Protocol I, Protocol II, and the Convention on the Means of Prohibiting and Preventing the Illicit import, Export and Transfer of Ownership of Cultural Property (1970 Convention).\(^58\)

In the world of cultural property, the 1954 Convention for the protection of Cultural Property in the Event of Armed Conflict is the fundamental starting point for discussions on state’s responsibilities to protect cultural property. By 1954, the international community had seen large advances in the technologies of warfare, which translated into higher rates of destruction of cultural property. Under Article 4, parties to this convention undertake to respect their own cultural property by refraining from using it in ways that may damage it or place it in the path of armed conflict.\(^59\) This obligation can only be waived if the state can show military necessity.\(^60\) Parties also agree not to carry out acts of retaliation against another Contracting Parties’ cultural property in the event of armed conflict.\(^61\) Article 5 of the convention specifically places additional obligations on any contracting party that is an occupying power. Under the 1954 Convention an occupying power must support the efforts of the local authority in protection of its own cultural heritage,\(^62\) when necessary act to preserve cultural property located in military areas of the

\(^{57}\) Keane & Azarov, supra.


\(^{59}\) 1954 Convention, supra note 1, at art. 4(1).

\(^{60}\) 1954 Convention, supra note 1, at art. 4(2).

\(^{61}\) 1954 Convention, supra note 1, at art. 4(4).

\(^{62}\) 1954 Convention, supra note 1, at art. 5(1).
occupied territory which has been damaged in military efforts, and, if there is no competent national authority, an occupying state, “shall, as far as possible, and in close cooperation with such authorities, take the most necessary measures of preservation.”

There are two protocols that followed the Hague 1954 Convention. The First Protocol focuses on importation and exportation of cultural property, which will be discussed in great detail later in the paper. The Second Protocol to the Convention for the Protection of Cultural Property in the event of Armed Conflict 1954, was passed in 1999. Whereas the 1954 Convention and the First Protocol focused on the looting and destruction of already identified cultural property, the Second Protocol focused on nation’s right to all cultural property in their territory, even if it had yet to be discovered. Article 9(1)(b) of the Protocol II demanded that states who were a party to this protocol prevent all archeological digs in occupied territory unless it was absolutely necessary for the preservation of the cultural property. Article 9(2) of Protocol II goes on to require that any archeological digs or use of cultural property by an occupying power be done in cooperation with the authorities of the occupied territory.

2. Oslo Accords

The framework agreed to in the Oslo Accords still defines the political, social, and economic relations between Israel and Palestine. The relations around cultural property are no different. In Oslo I both parties stated a goal of eventually transferring control of all Palestinian cultural property from the Israeli Military to the Palestinian government. This transfer was intended to happen at the same time as the planned 18-month handover of all civil and military responsibilities to the newly created Palestinian government. However,

63 1954 Convention, supra note 1, at art. 5(2).

64 Id.

65 Keane & Azarov, supra.

66 Id.

67 Kersel, Fractured, supra.
neither handover has happened: “to this day, the Israelis have retained full civil and military authority over Area C, the vast majority of Palestine.”

In Oslo I both Israel and Palestine agreed to “protect and safeguard the cultural heritage [of Palestine] from looting, development, and the detrimental effects of tourism.” Furthermore, Israel gave the Palestinians a list of the sites in Areas A, B, and C they felt were of religious or historical importance to them. This list was intended for use by the Joint Archeology Committee, created in Oslo II, whose purpose was to determine a way of dealing with cultural heritage sites that had significance for both Israelis and Palestinians. However, the committee was never formed.

The most important agreement to come out of Oslo II, in regard to the Palestinian Authority’s rights was in Article 9. Article 9(5)(b) gives the Palestinian Authority the ability to, “conduct negotiations and sign agreements with states or international organizations… in regard to “(4) cultural, scientific and education agreements.” As stated previously, in the Oslo II agreement, Israel and Palestine set up a gradual transition of power over Areas A, B, and C in this transition, power over archaeology would transfer with power over civil administration. Annex II, Article 2(1) defines power of archaeology to include, “the protection and preservation of archaeological sites, management, supervision, licensing and all other archaeological activities.” Since the transfer of power was never completed, Israel still maintains control

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68 Kersel, Fractured, supra, at 4.

69 Kersel, Fractured, supra, at 6.

70 Kersel, Fractured, supra.


72 Oslo II, supra note 53, art. 9(5)(b)(4).

73 Oslo II, supra note 53, annex II, art. 2(1).

74 Oslo II, supra note 53, annex II, art. 2(1).
over Palestinian cultural heritage in Area C or 60% of Palestine’s entire cultural heritage.\textsuperscript{75} Each side also agreed to “undertake upon itself to respect sites in the West Bank…regarded as holy, or which hold archaeological value.”\textsuperscript{76}

3. \textit{Domestic Laws on Cultural Property}

After Israel took over the West Bank from Jordan in 1967, it kept the basic structure of Jordan’s Temporary Law no. 51 in regard to Cultural Property. However, through two Military orders, it made two changes with important implications. Military order no. 1166 was the first military order Israel passed that dealt with the issue of cultural heritage in the West Bank. This order simply made an Israeli Staff Officer in charge of the protection of all cultural heritage sites in the West Bank while maintaining all of the structure and rules of Jordanian Law no. 51.\textsuperscript{77} Additionally, Israel passed Military Order no. 1986, which gave the Israeli Staff Officer the power to determine if his attendance at the Council meeting was necessary, as compared to the Jordanian law, which required his attendance. The order also stated that council meetings would only happen when the Staff Officer determined they were necessary, as opposed to Jordanian law when there were regularly scheduled meetings. Technically, this law also allows the Staff Officer to carry out excavations without granting himself a license since he has full autonomy over excavations and is not accountable to any checks on that power. However, evidence does not support the existence of this particular practice.\textsuperscript{78} These two military decrees combined have the effect of giving the Staff Officer complete autonomy in his actions, which as we will see later, has detrimental effects on archeological discovery in Area C.\textsuperscript{79}

After Oslo II, the PA created the Palestinian Department of Antiquities and Cultural heritage to protect cultural heritage and archeological discoveries, run salvation

\textsuperscript{75} Palestine is an Official member of the ICC, The Palestinian News Network (Apr. 2015), http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20III.aspx#sch-1

\textsuperscript{76} Oslo II, \textit{supra} note 53, at annex II, art. 2(9).

\textsuperscript{77} Kersel, \textit{Fractured}, \textit{supra}, at 4.

\textsuperscript{78} Greenberg & Keinan, \textit{Present Past}, \textit{supra}, at 17.

\textsuperscript{79} Kersel, \textit{Fractured}, \textit{supra}. 
expeditions, as well as restore and conserve monuments.\textsuperscript{80} The Department of Antiquities has carried out hundreds of rescue excavations in its short existence. However, it does not have the funding, staff, or equipment it needs to keep up with all of the cultural heritage destruction occurring in Palestine. One main reason the Department doesn’t have the funding, staff, or equipment it needs is because there is no law outlining its work or existence.\textsuperscript{81} As part of the Draft law created in 2012, the government would create just such a department and set up a budget for it.\textsuperscript{82} However, due to the lack of elections since 2007, no new legislation has been passed and thus this law is still only a draft.

B. \textbf{Analysis of Application of Potentially Applicable Treaties and Laws.}

The laws and treaties discussed above are all relevant to the protection of Palestinian cultural heritage from destruction and digging. That does not mean each of the laws applies to this particular situation or that the parties involved feel obliged to follow them.

1. \textit{International Laws}

An examination of the duties imposed on Israel as a signatory of the 1954 Convention reveals that until 2012, Israel had no duty to protect Palestinian cultural heritage under Article 4. Each of the obligations to protect and prevent the destruction of other state’s cultural property only applies to contracting states. Palestine was not a contracting member of the 1954 Convention until March 22, 2012.\textsuperscript{83} Furthermore, the West Bank could not have inherited the status of a contracting party from Jordan. Both Israel and Jordan ratified the 1954 Convention in October of 1967, after the ’67 war, but the West Bank still could have been considered a territory of a contracting party. The reason the West Bank is not considered the territory of a contracting party is because Jordan never extended this convention to apply to the territory of the West Bank. Article 35 of the 1954 Convention says,

\begin{itemize}
\item \textsuperscript{80} Schipper, supra, at 276.
\item \textsuperscript{81} Schipper, supra.
\item \textsuperscript{82} Keane & Azarov, supra.
\item \textsuperscript{83} Country Programming Report, supra.
\end{itemize}
Any High contracting Party may at the time of ratification or accession, or at any time thereafter, declare by notification...that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.8485

In order to fully understand the significance of article 35, it is important to read it in the context of international customary law: “Under customary international law, as reflected in Article 29 of the Vienna Convention on the Law of Treaties, “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”86 Reading article 35 in the context of this customary international law, it becomes apparent that the intention of the article is to exclude territories until there is an affirmative action on the part of the Contracting state’s government. Jordan never registered the West Bank as falling under the convention and, thus, the West Bank could not have been considered a Contracting Party due to its affiliation with Jordan. After 1967, Israel could also have declared that the 1954 Convention applied to the territory of Palestine, but did not. Therefore, Palestine was not a High Contracting party until it signed the Convention in 2012. The obligations found in Article 4 of the 1954 Convention do now apply to Israel in regard to protecting Palestinian cultural property.

Similarly, the obligations in Article 5 of the 1954 Convention that are placed on Contracting Parties only apply when they are occupying another Contracting Party’s territory. Therefore, the previous analysis still applies. The next step then is to determine if, now that Palestine is a contracting party Israel is an occupier in the sense that it must follow Article 5’s obligations. Israel has maintained that it is not an occupier under the definition offered in Article 2 of the Fourth Geneva Convention, which states that it applies to occupations of other “High Contracting Parties.”87 Similar to the analysis above of the

84 1954 Convention, supra note 1, at art. 35.

85 For a further discussion of why the West Bank was considered a territory of Jordan instead of being part of Jordan please see, John Quigley, The Statehood of Palestine: International Law in the Middle East, (Cambridge Univ. Press 2010).


West Bank as a territory of Jordan, Israel maintains that, immediately preceding the 1967 war, the West Bank was not a territory of Jordan. Therefore, it is not an occupier. On the other side of the argument under Article 42 of the Hague Regulations, a, “Territory is considered occupied when it is actually placed under the authority of the hostile army.”

The debate about whether Israel is an occupier exceeds the limits of this paper. However, since Palestine ratified the 1954 convention, if Israel is an occupier, Article 5 obligations would apply.

The applicability of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 1999 (Protocol II) is twofold. First, Israel did not ratify this convention. Unless it has become customary international law, which is highly unlikely considering the lack of broad ratification of this Protocol, Israel will not be held to the obligations it sets out. Secondly, if Israel had ratified Protocol II, it would then be necessary to determine if it were an Occupier in order to discover if article 9 Protections of Cultural Property in occupied territory applied.

2. Oslo Accords

The Oslo Accords have an important role to play in the interpretation of the applicability of the 1954 Convention. Palestine could not be a High Contracting Party to the 1974 Convention if it were not for Article 9(5)(b)(4) of Oslo II. Furthermore, the statements of intent by Israel to transition the territories of Area A, B and C to Palestinian sovereign control puts distinct perimeters around which cultural property Israel must protect because it belongs to the future state of Palestine.

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88 Karayanni, supra.

89 Karayanni, supra, at 19.


91 Protocol II, supra note 72.
3. **Domestic Laws on Cultural Property**

Israeli Military orders no. 1166 and 1986 both apply to Palestinian cultural property while it is in the territory of Palestine. Thus, while in the West Bank, the Staff Officer has a duty to preserve and protect Palestinian cultural heritage.\(^\text{92}\)

\(^{92}\) Greenberg & Keinan, *Present Past*, *supra*. 
IV. ACTIVITIES ON THE GROUND THAT MAY BE SUBJECT TO INTERNATIONAL LAWS, TREATIES AND LOCAL LAWS

A. Destruction of Cultural Property Sites by Occupier

1. Nablus

The center of Nablus, which is mainly located in Area A, was originally founded by the Canaanites in 2500-3000 BC and is made up of connected houses with time period specific courtyards all in a small area organized in a traditional layout which includes alleys and wide open market spaces.93 Around 1997, reconstruction efforts began in the center of Nablus, which involved both local people and NGO’s. However, after the second Intifada in 2000, the Israeli military re-occupied most of the West Bank. In an effort pressure the population of Nablus into submission to the re-occupation, the military spent eighteen days using heavy artillery around the clock. By the end of the eighteen days, “64 buildings [were extensively] damaged and 221 buildings moderately damaged.”94

At the time of this attack on the city of Nablus, the 1954 Hague Convention did not apply. In the event of a similar attack happening now that Palestine is a High Contracting Party to the 1954 Convention, Israel could claim military necessity under article 4(4). The 1954 Convention mandates that state parties adopt legal ramifications for individuals who “breach the present Convention.”95 Thus Palestine could try to charge the military commanders who ordered the attack on the Old City of Nablus with breaching their duty to preserve and protect the cultural property of another High Contracting Party, but that would be their only recourse.

This attack on the center of Nablus is in violation of Annex II, Article 2(9) of Oslo II, in which Israel and Palestine agreed to respect sites which “hold archeological value.”96 The failing of Oslo II is that it did not define how the parties would determine if a site has

93 Hammami, supra, at 238.

94 Id.

95 1954 Convention, supra note 1, at art. 28.

96 Oslo II, supra note 53, at annex II, art. 2(9).
“archaeological value.” Oslo II left all such decisions up to the Joint Committee that was never formed. Therefore, legally, the attack and destruction of the old city of Nablus may not have been a violation of the 1954 Convention or Oslo II.

2. **Construction of the Wall/Separation Barrier**

Israel began the construction of the Wall, or Security Barrier, in 2003, in an effort to stop attacks on Israeli civilians. It has largely been successful in achieving this aim. Since the construction of the wall, attacks on Israelis have fallen by more than 90%. The effects of the wall are not limited to decreasing, terror attacks, however. According to the Palestinian Department of Antiquities and Cultural Heritage, the wall affects roughly 50% of Palestinian cultural heritage sites because it is not built strictly along the green line, or 1949 Armistice line. It has been estimated that due to the construction of the wall, 6.7% of the West Bank’s cultural property has been permanently destroyed. There have been a few cases brought before the Israeli High Court of Justice in regard to the path of the Wall through cultural heritage sites. On average, the court has ordered one of three responses to such cases. The first option is to move the path of the wall to include the cultural site on the Israeli side. The second option is for Israeli archaeologists to carry out a ‘salvage excavation.’ A salvage excavation is when a group of archaeologists goes into a cultural site and strips all of the antiquities under the guise of protecting them. Finally, the third possible response is to cover the entire site with dirt to protect it from exposure to the construction of the wall, then uncover it when the building has finished. While this form of protection is preferable to many, it is simply not feasible on a regular basis. Thus, the

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97 Oslo II, *supra* note 53.


100 Schipper, *supra*, at 284.

101 Al-Houdalieh, *Oslo*, *supra*.

102 Id.
court often simply rules that the wall be moved and yet another Palestinian cultural heritage site is blocked from Palestinian access.

Under the 1954 Convention, Israel now has a duty to respect the cultural property of Palestine as another High Contracting Party under article 4(1) and to refrain from taking cultural property that is movable from Palestinian territory under article 4(5). The destruction of Palestinian cultural heritage is a clear violation of article 4(1). The salvage expeditions are exceptions to the acquisition of an occupied territory’s cultural property that will be discussed further in the section on exportation by an occupier. However, it could be argued that under article 4(5) of the 1954 Convention, Israel should be handing over any cultural property it discovers during its salvage expeditions. Furthermore, with an understanding of the rioting and violent clashes that often happen along the wall, it could be argued that Israel is violating article 4(1) by using the “immediate surroundings” of the heritage sites for “purposes, which are likely to expose it to destruction or damage in the event of armed conflict.” If Israel is considered an occupier, it has clearly violated both sections 1 and 2 of article 5 of the 1954 Convention because it is not supporting or working in “close co-operation with” the Palestinian Authority to protect Palestinian cultural property.

The construction of the wall is hindering the Palestinian Authority from carrying out its responsibilities under Oslo II. Since the wall is affecting cultural heritage sites in Areas A, B, and C it is making it impossible for the PA to protect those sites which it is technically responsible for. By building the wall so as to include Palestinian cultural heritage sites in Israel, Israel has effectively taken back the responsibilities of “protection and preservation of archaeological sites, management, supervision, licensing and all other archaeological activities” which it had given to the PA in Annex II, Article 2(1) of Oslo

103 1954 Convention, supra note 1, at art. 4(1).

104 Id.

105 1954 Convention, supra note 1, at art. 5(2).
Furthermore, it is not fulfilling its obligation to respect sites, which hold archaeological value.\footnote{Oslo II, \textit{supra} note 53, at annex II, art. 2(1).}

**B. Excavation of Archeological Sites in the Occupied Territory**

1. \textit{Excavation of Al-Khirbe in the Northern West Bank}

Al-Khirbe is a small town located in Area C in the northern section of the West Bank. It was believed that a Samaritan synagogue had been located in this area. In 1990 the Israeli Staff Officer, in charge of protecting Palestinian Cultural Heritage in Area C, directed the excavation of al-Khirbe in an effort to find evidence of the synagogue.\footnote{Oslo II, \textit{supra} note 53, at annex II, art. 2(9).} Technically the Staff Officer’s job is supposed to be “devoted to the protection and salvage of [Palestinian] antiquities threatened with destruction due to looting, construction, military operations etc.”\footnote{Oyediran, \textit{supra}, at 50.} Despite the Staff Officer’s job description, the al-Khirbe excavation resulted in the discovery of a mosaic that showed traditionally Jewish ritual objects such as a menorah. “The central section of this mosaic is now on display at the Israeli Museum.”\footnote{Greenberg & Keinan, \textit{Present Past}, \textit{supra}, at 18.}

Under the 1954 Convention, the Staff Officer’s excavation of al-Khirbe is ambiguous. Some argue it is legal under article 4(3) because it was necessary to protect the cultural property from pillage, vandalism, or destruction.\footnote{Oyediran, \textit{supra}, at 50.} It can also be argued that the 1954 Convention does not address excavations, but instead offers protection to already discovered cultural property. Supporting this argument is the existence of article 9 of Protocol II, which prevents archaeological excavation, “save where it is strictly required to safeguard, record to preserve cultural property.”\footnote{Protocol II, \textit{supra} note 72, at art. 9(b).}
protection to excavations, Protocol II would be redundant. Thus because Protocol II specifically sets out protections for archeological excavations, it is unlikely that they can be considered covered under the 1954 convention.

If this excavation occurred after 2012, Israel would have violated article 4(3) of the 1954 Convention when it brought the mosaic to the Israel Museum to be displayed. As a Party to the 1954 Convention Israel has an obligation to “refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.” If Israel is considered an occupier of the West Bank and this action took place after 2012, Israel would have violated article 5 for not working with the Palestinian Authority on the excavation. Al-Khirbe’s location in Area C means that, according to the Oslo Accords, the Palestinian Authority had no rights over this cultural property. Finally, the Staff Officer’s actions did not violate Israeli Military Law no. 1986 as long as his stated reason for the excavation was to protect the cultural heritage site.

113 1954 Convention, supra note 1, at art. 4(3).
V. LOOTING, EXPORTATION, BLACK MARKET ACTIVITY, AND IMPORTATION OF PALESTINIAN CULTURAL PROPERTY

In addition to destruction and illegal excavation, Palestinian cultural property is threatened by looting, which is fueled by an easily accessible black market that has been established due to the current laws around importation and exportation of cultural property in Palestine and Israel.

A. Accords and Laws Potentially Applicable to Looting, Exportation, Black Market Activity, and Importation of Palestinian Cultural Property

1. International Laws

Once again the 1954 Hague Convention must be the basis of any analysis on the protection of cultural property. Article 4 of this Convention imposes two duties on states in regard to looting, black market activity, importation, and exportation of cultural property. Article 4(3) states that parties to this convention have agreed to take on the obligation of “preventing and if necessary putting a stop to any form of theft, pillage or misappropriation…directed at cultural property.”\(^\text{114}\) Additionally, under article 4(3) parties agree to “refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

At the same time as the passage of the 1954 Convention, the parties passed the First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (Protocol I). The Protocol addresses cultural property taken from occupied territories in more detail than the original convention. Specifically, it places several additional obligations on all state parties who occupy other state parties’ territory. First, parties’ are to prevent cultural property being exported from the territory they occupy during a conflict.\(^\text{115}\) Second, parties must seize any illegally obtained cultural property that has been relocated from the occupied territory to its own territory.\(^\text{116}\) This seizure should happen automatically; however, it this doesn’t happen, the occupying government has a

\(^{114}\) 1954 Convention, supra note 1, at art. 4(3).


\(^{116}\) Protocol I, supra note 97, at art.1(2).
duty to seize the objects at the request of the occupied government.\textsuperscript{117} Finally, parties must return any illegally obtained cultural property, which they seize from another territory, upon the secession of violence in the occupied territory.\textsuperscript{118}

In 1999 the International community gathered to create a Second Protocol, creatively called the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (Protocol II). Whereas the 1954 Convention and Protocol I focused on the looting and destruction of already identified cultural property, the Second Protocol took into account nations rights to their cultural property that had yet to be discovered, specifically in occupied territories. Article 9 lays out three relevant obligations for contracting parties who are occupying territory of other contracting parties. First, occupiers must prevent, “any illicit export, other removal or transfer of ownership of cultural property.”\textsuperscript{119} Second, states who are party to this protocol should prevent all archeological digs in occupied territory unless absolutely necessary for the preservation of the cultural property.\textsuperscript{120} Finally, the Protocol II requires that any archeological digs or use of cultural property by an occupying power be done in cooperation with the authorities of the occupied territory.\textsuperscript{121}

As part of its mission, the United Nations Education, Scientific, and Cultural Organization (UNESCO) works to protect cultural property in a variety of ways. In 1970 UNESCO attempted to codify states’ responsibilities to their own cultural property as well their duties to prevent the increasing amount of illicit trade around the world in the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (1970 Convention). Through codification of these duties and responsibilities, UNESCO hoped to encourage nations to adopt such principles and agree to be bound by them through ratification of the 1970

\textsuperscript{117} Id.

\textsuperscript{118} Protocol I, \textit{supra} note 97, at art.1(3).

\textsuperscript{119} Protocol II, \textit{supra} note 72, at art. 9(1)(a).

\textsuperscript{120} Protocol II, \textit{supra} note 72, at art. 9(1)(b).

\textsuperscript{121} Protocol II, \textit{supra} note 72, at art. 9(2).
Convention. This convention provided state signatories with concrete duties, such as creating licensing systems for their own cultural property, establishing import and export restrictions on cultural property etc. It is important to note that, “unlawfully excavated cultural objects are not covered by the 1970 Convention which only provides for the restitution of inventoried cultural objects stolen from a museum or similar institution.” \(^{122}\)

2. **Oslo Accords**

Under Oslo I, both Israel and Palestine agreed to, “protect and safeguard [Palestinian] cultural heritage from looting, development, and the detrimental effects of tourism.” \(^{123}\) In Oslo II, both parties agreed to try to “take steps to prevent the theft of archaeological artifacts.” \(^{124}\) In order to do this, they agreed to enforce laws against the illegal trading of cultural property, \(^{125}\) communicate and “take necessary measures to combat the theft of cultural property, and illegal trade and transport of archaeological artifacts, including between area under the territorial jurisdiction of the two sides….\(^{126}\)

3. **Domestic Laws on Cultural Property**

In 1978, Israel passed a law that “vested ownership of archaeological material in the state.” \(^{127}\) This type of law is not uncommon; in fact most Western countries have a similar law. The point of such a law is to allow a country to lay claim to cultural property, which has yet to be discovered. However, the 1978 Israeli Antiquities law (AL 1978) specifically excludes antiquities discovered prior to 1978. Thus, any antiquity that the owner/dealer claims was discovered prior to 1978 can be sold legally in Israel. \(^{128}\)

\(^{122}\) Keane & Azarov, supra.

\(^{123}\) Kersel, *Fractured*, supra.


\(^{125}\) Oslo II, *supra* note 53, at annex II, art. 2(11)(b).

\(^{126}\) Oslo II, *supra* note 53, at annex II, art. 2(11)(c).

\(^{127}\) Keane & Azarov, supra.

The Israeli Antiquities Law (AL 1978), is cited as the number one reason for the high volume of Palestinian antiquities being looted. Some scholars even go as far as to say that it encourages looting by creating a market for illicit antiquities.\textsuperscript{129}

In an effort to curb looting, Israel has amended their 1978 law several times. The first round of amendments created the Israeli Antiquities Authority (IAA) and gave it authority over all cultural property in Israel with the power to “excavate, preserve, conserve, and administrate antiquities when necessary.”\textsuperscript{130} The amendments also established cultural property inspectors who were given the authority to investigate possible breaches of AL 1978.\textsuperscript{131} The 2002 round of amendments added §20(a) requiring any antiquities that leave Israel to have written approval from the Director of the IAA.\textsuperscript{132} In 2003, as a direct reaction to the number of antiquities being looting in the West Bank and sold legally in Israel, the Israeli government again amended AL 1978 this time adding in §22(A). This amendment makes it illegal for a person to bring any antiquity from the West Bank without permission from the Director of the IAA.\textsuperscript{133} Additionally, while the amendment still allows general permits, permits that are assigned to a dealer instead of each individual artifact, requires that all general permits be published.\textsuperscript{134}

Despite the role of Israel’s 1978 law in promoting the illicit sale of Palestinian antiquities, the blame does not solely rest on Israel. The Palestinian Authority has yet to pass a law which declares any undiscovered cultural property in the West Bank belongs to Palestine. In 2012, with the help of UNESCO, the Palestinian Ministry of Tourism and Antiquities drafted the Palestinian Heritage Law.\textsuperscript{135} This draft law had four main tenants;

\textsuperscript{129} Al-Houdalieh, Political Crisis, supra.

\textsuperscript{130} Morag M. Kersel, The Trade in Palestinian Antiquities, 33 Jerusalem Quarterly 22-29 (2007).

\textsuperscript{131} Kersel, supra, at 29.

\textsuperscript{132} Kersel, supra.

\textsuperscript{133} Kersel, supra, at 30.

\textsuperscript{134} Kersel, supra, at 30.

\textsuperscript{135} Country Programming Report, supra.
first, all cultural heritage would be declared as under public ownership; second, the law would impose a ban on the illicit transfer or sale of any cultural property; third, the law would allow Palestinian authorities to reclaim any illegally sold or transferred property; and finally, the law would create another administrative authority to, “preserve, protect and develop cultural heritage in Palestine.” This draft law would constitute a huge step forward in the protection of Palestinian cultural heritage. However, the law cannot be officially adopted without the vote of the Legislative council, which as explained earlier, has not met since 2007. The passage of such a law, however, would not truly give Palestine the tools to fight looting of cultural heritage sites until it controls its own borders.

B. Analysis of the Application of Potentially Applicable Treaties and Laws

1. International Laws

Similar to the previous section, the 1954 Convention for the protection of Cultural Property in the Event of Armed Conflict did not apply to the West Bank until after the Palestinian Authority ratified it in 2012. The First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 also can only be said to be applicable after the Palestinian Authority ratified it in 2012. This is because, similarly to the 1954 Convention, Protocol I also contained a territorial registration article which neither Israel or Jordan register the West Bank under.

Protocol II, which directly addresses archeological excavations in Occupied Territory does not apply to Palestinian cultural property illegally taken out of the West Bank and sold in Israel. This is because Israel never ratified that convention. Israel’s non-ratification of Protocol II does not mean that it couldn’t still apply. In order to argue that Protocol II applied to illicit Palestinian cultural property imported and exported in Israel, it would have to be shown that the obligation imposed on State parties by Protocol II had become part of international customary law. One factor in a treaty or convention becoming part of international customary law is if most nations in the world, especially the

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136 Keane & Azarov, supra.

137 Id.

138 Protocol II, supra note 72.
five Permanent (P5) members of the Security Council, have ratified it.\textsuperscript{139} Protocol II has no such support.\textsuperscript{140}

Similarly to Protocol II, the 1970 Convention on the Means of prohibiting and preventing the illicit import, Export and Transfer of Ownership of Cultural Property also does not apply in the case of Israel and Palestine because it has not been ratified by Israel and has not become international customary law.\textsuperscript{141}

2. \textit{Oslo Accords}

The agreements found in Oslo I and Oslo II in regard to the protection of cultural property in the West Bank provide a strong basis for an argument against unilateral destruction of cultural heritage sites. They also lay the ground work for movement forward on the protection of Palestinian cultural property.

3. \textit{Domestic Laws on Cultural Property}

With the exception of §22(a) which applies only to antiquities coming from the West Bank, the Israeli Antiquity law of 1978 applies to all illicit antiquities in the Israeli market. Since numbers have shown that Israel is the main antiquities black market in the Middle East, it is important that the sale, export and import of illicit antiquities be regulated.\textsuperscript{142}

\begin{flushright}
\textsuperscript{139} Lori F. Damrosch, Louis Henkin, Sean Murphy, Hans Smit, \textit{International Law Cases and Materials}, (5th ed. 1980).
\end{flushright}

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\textsuperscript{140} Protocol II, \textit{supra} note 72.
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\textsuperscript{142} Kersel, \textit{supra}.
\end{flushright}
VI. ACTIVITES ON THE GROUND THAT MAY BE SUBJECT TO INTERNATIONAL LAWS, TREATIES AND DOMESTIC LAWS ON CULTURAL PROPERTY

The international conventions examined in this paper lend themselves to two different analyses of Israel’s obligations as a High Contracting Party. Namely, Israel must be analyzed as both an occupier of the West Bank and as a non-occupier of the West Bank in order to understand the full range of possible obligations Israel may have in regard to the protection of Palestinian cultural property. The next four case studies will reflect this division.

A. As an Occupier

1. Looting of cultural heritage Sites in the West Bank

As has been evident throughout this paper, looting of Palestinian cultural heritage sites is an ever growing problem. Israelis claim the looting is the result of Palestinians not properly guarding their cultural heritage sites, while Palestinians argue that Israelis do not adequately protect cultural heritage sites in Area C.\footnote{Al-Houdalieh, Political Crisis, supra.} Khirbet el-Lauz is one such site in Area C.

The small town of Khirbet el-Lauz is in Area C and, thus, under full Israeli control. It was picked as a looting site because of, “its location in Area C, where policing and monitoring of heritage resources was and is minimal.…”\footnote{Al-Houdalieh, Political Crisis, supra, at 341.} There have been three major phases of looting in Khirbet.\footnote{Al-Houdalieh, Political Crisis, supra.} The first phase of looting began in the 1970’s when Palestinian laborers from other archeological digs in the area decided to carry out excavations of their own. The second phase of looting occurred after the first Intifada when the Palestinian economy was particularly bad and unemployment had skyrocketed. Finally, the third phase of looting began in 2000 and is still continuing today.\footnote{Id.} The protective monitoring of this site is so lacking that,
Six of the gangs have used bulldozers to illicitly dig in broad daylight without reservation. These heavy machines have worked nearly 230 hours at the site and have damaged a 45000 sq. area by excavating it down to bedrock, thus eliminating all cultural materials.\textsuperscript{147}

As a signatory to the 1954 Hague Convention under article 4, Israel has a duty to prevent and, if necessary, act to end “any form of theft, pillage or misappropriation…directed at cultural property.”\textsuperscript{148}

As an Occupier and High Contracting Party of Protocol I, Israel has the obligation to prevent the exportation of the artifacts discovered by the looters out of Palestine.\textsuperscript{149}

According to Oslo II, the Israeli Staff Officer in charge of Area C should work with the Palestinian Authority to protect sites like Khirbet el-Lauz more effectively.\textsuperscript{150}

\section*{2. Exportation of Cultural Property out of Occupied Territory}

The legal system over cultural property in Area C, created by Military Order numbers 1166 and 1986, has given the Israeli Staff Officer free reign. The Staff officer has full control over the granting of excavation licenses in Area C and, as it turns out, most of the licenses granted are to himself and his staff. Any artifacts discovered by the Staff Officer are then generally stored in a warehouse in East Jerusalem.\textsuperscript{151} However, there are exceptions such as in the case of the Staff Officer’s excavation of al-Khirbe in Area C, discussed earlier, that resulted in the discovery of a mosaic, which is now displayed in an Israeli Museum.

\begin{itemize}
  \item \textsuperscript{147} Al-Houdalieh, Political Crisis, supra, at 341.
  \item \textsuperscript{148} 1954 Convention, supra note 1, at art.4(3).
  \item \textsuperscript{149} Protocol I, supra note 97, at art.1(1).
  \item \textsuperscript{150} Oslo II, supra note 53, annex II, art. 2(11)(c).
  \item \textsuperscript{151} The maintenance of Palestinian cultural artifacts in East Jerusalem offers an interesting paradox. By keeping artifacts in East Jerusalem, a territory the Palestinians hope to make the capital of their future state, Israel is trying to claim it is not illegally exporting cultural property from the occupied territory. At the same time however, Israel claims to have annexed East Jerusalem, after the 1967 war, a move, which the U.N. has deemed illegal. See B’TSELEM’s discussion of East Jerusalem at: http://www.btselem.org/jerusalem/legal_status. Thus Israel must choose if it is either exporting cultural property from occupied Palestinian territory or if it has not Annexed East Jerusalem.
\end{itemize}
This acquisition of Palestinian cultural heritage is in violation, after 2012, of article 4(3) of the 1954 convention, which states that parties must “refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.” However Israel’s biggest violation in taking in the Mosaic comes under Protocol I. Protocol I requires that State parties prevent cultural property from being exported from the territory they are occupying and if illicit cultural property is discovered in their own country they are to seize it and return it to the government of the occupied country. Protocol I’s protections are limited to occupied territories that are High Contracting Parties to the convention and who are being occupied by another High Contracting Party, thus the taking of the Mosaic was only a violation after 2012.

B. As a Co-signatory (not an Occupier)

1. Importation of illicit antiquities and black market activity

It is a well-documented fact that looting and the exportation of Palestinian cultural property are one of the biggest threats to Palestinian heritage. In fact, due to Israel’s AL 1978, Israel has been referred to as a “collector’s paradise.” Collectors, like Oded Golan, are easily able to acquire illicit cultural property from heritage sites inside Israel and the West Bank. It is estimated that Golan has acquired some 600,000 biblical relics. There are two reasons why Golan was able to collect so many illicit antiquities. First, the AL 1978 relies on buyers not sellers of antiquities to request export permits. Thus when a dealer sells an item that has been authenticated and given a legitimate inventory number he can simply reassign the inventory number to another similar item because, without an exit permit, there is no record of the sale of that inventory number. Second, AL 1978 places

152 1954 Convention, supra note 1, at art. 4(3).

153 Protocol I, supra note 97, at art. 1(1-3).

154 Schipper, supra.

155 Kersel, supra.


the burden of proving whether an item was discovered pre or post 1978 on the IAA.\textsuperscript{158} The AL 1978 is also the number one reason Israel has such a thriving black market for antiquities; the ease with which permit numbers can be transitioned from one antiquity to the next makes Israel the perfect transit point for illicit cultural property.\textsuperscript{159}

The main international law governing illicit trade in antiquities is the 1970 Convention that Israel did not ratify. Therefore, it is necessary to look to other international agreements to determine if Israel is violating any of its obligations in regard to Palestinian cultural property.

Once again, article 4(3) of the 1954 Convention can be used to argue that Israel has a duty to stop illicit trade in Palestinian antiquities. Israel’s 2002 and 2003 amendments to AL 1978 were clearly an effort to address this issue. However, the new §20(a) and §22(a) additions have not succeeded in decreasing the number of looted Palestinian antiquities because they do not address the methods used to transition illicit antiquities onto the legal market. Namely, the law needs to address the export laws around the acquisition of export permits in order to combat importation of illicit antiquities.\textsuperscript{160} Protocol I, requires all High Contracting Parties to seize any cultural property that is brought into their territory from an occupied territory, not just the territory it is occupying.\textsuperscript{161} Furthermore, Protocol I, article 1(3) requires that all High Contracting Parties return cultural property,

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.\textsuperscript{162} Thus at the end of hostilities, all High Contracting Parties of Protocol I must return Palestinian cultural property that was removed during the occupation of the West Bank, but after 2012, without the permission of the Palestinian Authority. The difficult part of

\textsuperscript{158} Burleigh, \textit{supra}.

\textsuperscript{159} Bruce Bower, \textit{Networks of plunder: archaeologists tracing the labyrinth of antiquities trafficking hope to shut it down or at least slow it up}, Science News, Mar. 28, 2009, at 20.

\textsuperscript{160} Kersel, \textit{supra}, at 30.

\textsuperscript{161} Protocol I, \textit{supra} note 97, at art. 1(2).

\textsuperscript{162} Protocol I, \textit{supra} note 97, at art. 1(3).
this requirement is how to determine when the hostilities are over.\textsuperscript{163} Israel’s AL 1978 is also violating the Israeli and Palestinian agreement in Oslo II, to “enforce prohibitions on illegal trading in archaeological artifacts and shall, in this context, prevent any transfer of such artifacts to Israel or abroad.”\textsuperscript{164} Clearly, Israel is not successfully preventing the transfer of Palestinian artifacts into Israel or abroad.


\textsuperscript{164} Oslo II, supra note 53, annex II, at art. 2(11)(b).
VII. RESTITUTION

Given the clear failure on the part of the Israeli and Palestinian governments to prevent damage to Palestinian cultural heritage in any form, but especially in the form of looting and illicit export either to the black market or Israeli military store houses or museums, it becomes important to discuss the issue of restitution. The concept of returning cultural property, taken in a time of war, back to its nation of origin, has existed in the international community for a long time. Some sources site to the Munster Treaty of 1648 as the first example of the inclusion of universal restitution of personal property in a treaty. However, the concept of restitution was also included in the highly influential Treaty of Westphalia signed the same year. Following the 1648 Treaty of Westphalia, the concept of restitution in many different forms was included in such foundational documents as: the 1907 Hague Convention on the Laws of War; Post-WWI settlement agreements; the Declaration of London 1943; the 1954 Hague Convention; the First Protocol to the 1954 Hague convention; the 1999 Second Protocol to the 1954 Hague convention; and the 2003 UN Security Council Resolution requiring the return of Cultural Property looted from the Iraqi museum. Despite the inclusion of restitution in all of these international agreements, the issue of restitution of cultural property has been most publicized due to WWII claims that are still going on today.

Legally the return of cultural property can fall under one of three headings: restitution, repatriation, or return. While all three of these terms essentially mean the movement of a piece of cultural property back to the territory it came from, the distinction is extremely important in determining if such movement is mandatory and what types of remedies are available to theaggrieved state. The term restitution is generally used in referring to return of cultural property looted during a time of war. Importantly, for the present case, restitution requires an unconditional return of the cultural property in question. The second term utilized to describe the movement of cultural property back to


166 Id.

its original territory is repatriation. Repatriation has come to mean the return of cultural property from colonial powers to the territory or ethnic group it came from. Finally, the third term used in this context is, return. The term Return now indicates the return of cultural property that was removed prior to the development of international law and pursuant to a sale, gift, or trade which would now be illegal or morally frowned upon under current international law. As an example, India’s Koh-i-Noor diamond was a gift during colonial times that would be morally frowned upon under international law today.\textsuperscript{168}

In the present case, the Palestinian government will be requesting restitution of illicitly exported and looted artifacts. Technically the Palestinian government could bring restitution claims for the illegal destruction of its cultural heritage, however such claims would only be decided through bilateral agreements. Thus this section will only focus on the various legal duties of restitution in regard to Palestinian cultural heritage. The legal analysis of the restitution of Palestinian cultural heritage is complicated due to its recent 2012 ratification of the 1954 Convention, Protocols I and II and the 1970 convention.\textsuperscript{169} None of the conventions ratified by Palestine provide for retroactive applications of the duties they contain. Thus, the analysis of nations’ duties in regard to restitution of Palestinian cultural heritage must include a separate analysis of pre-and-post 2012 duties. There are three different types of cultural heritage property that the Palestinian government could request to be returned: artifacts found in foreign nations (other than Israel); artifacts from Palestinian territory that are now displayed in Israeli museums or are known to be in private collections; and artifacts from Palestinian territory that is now stored by the Israeli military in the warehouses in East Jerusalem.

\textbf{A. International Treaties}

The 1954 Hague convention, which was ratified by both parties, has only one provision that mentions the return of cultural heritage pieces, art. 18(b). It states that, if cultural property is moved abroad for special protection during a conflict, the state it is

moved to, “shall return the property only on the cessation of the conflict; such return shall be effected within six months from the date on which it was requested.”  

Since the 1954 Hague convention does not obligate Parties to return cultural heritage until the end of the conflict it does not impose any immediate duties on Israel or the international community to return Palestinian cultural heritage. Additionally, when hostilities do finally come to an end, the 1954 convention will only impose a duty of restitution on those States who are both co-signers of the convention and holders of Palestinian cultural heritage for the purposes of protection from the hostilities. Thus, there is no duty to return illicitly looted cultural property.

Protocol I places more extensive duties on its signatories, of which Israel and Palestine are two of the 104 state signatories. As discussed previously, art. 1(1) of the first protocol mandates that parties prevent the exportation of cultural property from territories it occupies during an armed conflict. However, Article 1 of the Protocol also places three restitution duties on signatories, not all of which are limited to direct occupiers. Art. 1(2) requires that state parties confiscate any cultural property coming within their own territory that has come from “any occupied territory.” If the country to which the property is imported fails to confiscate it upon entry, it must do so when ask by the occupied government. Additionally, art. 1(3) requires that state parties return cultural property to the competent authorities at the end of hostilities, “if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.” Finally, art. 1(4), states that parties who were responsible for preventing the exportation of cultural property from the occupied territory, “shall pay

170 1954 Convention, supra note 1.

171 A legal analysis of the terms “cessation of conflict” and whether the Oslo Accords could meet that definition would be an interesting expansion on this analysis.


173 Protocol I, supra note 97, art. 1(2).

174 Protocol I, supra note 97, art. 1(2).

175 Protocol 1, supra note 97, art. 1(3).
an indemnity to the holders in good faith of *any* cultural property which has to be returned in accordance with the *preceding* paragraph [Art. 1(3)]."176 Finally, Protocol I echoes the 1954 convention in regard to return of cultural property removed from one signatory’s territory and placed in another signatory’s territory for protection. Under art. 2(5), such cultural property must be returned to the competent authority of the territory it came from after the “end of hostilities.”177

There are several interesting nuances present in Protocol I’s restitution duties. These nuances are found mainly in the distinction of obligations placed on occupiers versus other signatories. First, according to art. 1(1) the duty to prevent removal of cultural property from an occupied territory is held solely by the occupier. Failing to meet their prevention obligation, art. 1(3) mandates that, at the end of hostilities, an occupier must return any cultural property that resides within its own territory that was illegally exported from the territory it previously occupied. If Israel is deemed to be an occupier of Palestine, Protocol I places no obligation of restitution on it until the end of hostilities as well as the end of the occupation, an important distinction. This distinction comes from art. 1(3)’s use of the phrase, “return…to… the territory previously occupied.”178 Additionally, Israel only has an obligation to return the cultural property that is within its territory at the end of the hostilities. It has no responsibility to help Palestine retrieve its cultural property from other nations. Also important to note, is compensation mentioned in this section. The requirement that an occupying power must pay good faith holders of cultural property found in art. 1(4) only applies to the cultural property within its own territory. This is because the reach of art. 1(4)’s compensation is limited to cultural property “returned in accordance with the preceding paragraph” which is art. 1(3) return of cultural property within the occupier’s territory at the end of hostilities.179


177 Protocol I, *supra* note 97, art. 2(5).

178 Given this additional terminology makes any argument for the Oslo Accords meeting the “end of hostilities” requirement in the 1954 convention unproductive. A creative argument, would be that the Oslo Accords serve as evidence of the end of hostilities and Area A, which is technically no longer occupied, could fulfill Protocol I, art. 1(3)’s requirement of “territory previously occupied.”

Interestingly the duty on non-occupying signatories to take into custody cultural property brought into their own territory, either upon arrival or upon request by the authorities of the occupied territory, is not limited by the status of the hostilities. This means that state parties who are signatories to Protocol I must always be diligent about confiscating illicitly exported cultural property and authorities of occupied territories may request their cultural property be returned at any time. Thus, under art. 1(2) of Protocol I, the Palestinian Authority (PA) may request its cultural property be returned at any time. This allows the PA to request the return of any cultural property that was illicitly exported and sold to museums or art auction houses in a co-signatories’ territories, or Palestinian cultural property on loan from an Israel Museum to museums in co-signatories’ territory. The Israeli museum frequently puts together collections of artifacts which tour museums around the world. Art. 1(2) of Protocol I gives the Palestinian Authority the legal ability to request any Palestinian cultural property included in those shows be confiscated by governments who have ratified the Protocol. Finally, if the Palestinian government had placed any of its cultural heritage in another state signatories’ territory, that state should return the cultural property at the end of hostilities. To my knowledge the Palestinian government has made no such placements.

As discussed earlier, Israel did not ratify the Second Protocol to the 1954 convention and thus it is not applicable. However, even if it were applicable, the Second Protocol does not contain any specific language imposing a duty of restitution on signatories. Instead, the Second Protocol makes it a crime to attack, destroy, loot, pillage, vandal, or misappropriate cultural property. In order to punish such crimes, the Second Protocol requires signatories establish criminal offenses under their own domestic law, such that they can persecute acts carried out in their territory, their own citizens who carry out such acts or in extremely egregious cases foreign nationals who come into their territory. This convention could lead to an interesting discussion of the Palestinian government’s right to, and duty to, prosecute those who are looting their cultural heritage.

180 Protocol II, supra note 72, art. 15.

181 Protocol II, supra note 72, art. 16.
However, since these prosecutions would not be aimed at restitution, discussion of them is outside the scope of this paper.

Similar to the Second Protocol, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was only ratified by the Palestinian Authority and thus does not apply to Israel. However, it does apply to Palestine and the 131 other states who ratified it. According to Art. 7(a), state parties must attempt to prevent their museums from obtaining cultural property that has been illegally exported from another State parties’ territory, after the treaty has entered into force for both parties. The real strength of the treaty is found in art. 7(b)(ii). Art. 7(b)(ii) states that signatories must:

“at the request of the State Party of Origin, to take appropriate steps to recover and return such cultural property imported after the entry into force of this Convention in both states concerned, provided however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property….The requesting Party shall furnish at its expense, the documentation and other evidence necessary to establish its claim for recovery and return.”

182 1970 Convention, supra note 130.

183 1970 convention, supra note 130, at art. 7(b)(ii).

184 1970 convention, supra note 130, at art. 21.

Finally, the 1970 convention also requires state signatories recognize recovery of cultural property in their courts and co-operate with actions to return cultural property that has been illicitly exported.

Palestine ratified the 1970 Convention on April 22, 2012 which, according to art. 21, the convention means it took effect on June 22, 2012, three months after ratification. Upon this date the other 130 signatories to the 1970 Convention officially had a duty to try to prevent their museums from acquiring illicitly exported Palestinian cultural property. This is more powerful than it sounds. Much of Palestine’s cultural property that is excavated by the Israeli military is going to military store houses, as discussed previously. However, some of the cultural property pieces such as the Mosaic that was excavated in al-Khirbe make it to Israeli museums who frequently loan pieces out to museums across the world. Under art. 7(a), governments of these nations have a duty to prevent such loans,
and furthermore, if such loans go through, they have a duty to seize the items and return them to the Palestinian Authority under the First Protocol’s art. 1(2). The 1970 Convention’s art. 7(b)(ii) allows the Palestinian Authority to request that other state parties recover and return cultural property imported to their territories after June 22, 2012. However, there are three applicability issues here. First, this convention does not require the restitution of any cultural property imported before June 22, 2012, so considering how long Palestinian cultural property has been being illicitly exported, excludes the vast majority of cultural property currently outside of the territory from restitution. Second, in order to make return requests, the Palestinian Authority would have to be able to prove the piece of property came from Palestine and pay for the return process, two separate problems. It will be almost impossible for the Palestinian Authority to know or prove the origin of the majority of cultural property that has been excavated by either the Israeli military or looters. The military does not share its list of excavation finds with the Palestinian government; only very large finds are publicized. Second, illegal looters definitely do not keep a paper trail of where their finds come from. In fact, they actively try to erase any evidence of the artifact’s origins. Thus, given the largest threat to Palestinian cultural property is illegal excavation, the 1970 Convention does not provide much help in its restitution. Finally, the costs involved in proving an artifacts origins and arranging for its return can be extraordinarily expensive and out of the range of governments like the Palestinian Authority who rely mainly on financial aid from donor countries for their day to day operations. These applicability issues being taken into account, the 1970 convention does provide a way for the Palestinian Authority to request the return of their cultural property that shows up in museums, auction houses, and the legal art market in the territories of other parties to the convention.

B. Customary Law

Customary law is a set of rules that come from the general practice of a majority of states in regard to a certain issue. These laws may not have their origin in any treaty but instead in the actions taken by a majority of states out of a feeling of opinion juris, sense of legal obligation. They generally appear where there is a gap in the existing treaty law.

In the present case customary international humanitarian law deals with the issue of restitution through Rule 41. Export and Return of Cultural Property in Occupied Territory, states; “The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory.”186 Thus, according the practices of the majority of states, illicitly exported property must be returned to the occupied territory. Since this is only customary international law, it can add support to other arguments for the restitution of Palestinian cultural heritage and may be persuasive in convincing parties to return cultural property that technically falls outside of existing treaty parameters. However, argued alone, it will not force Israel to return Palestinian cultural heritage.

One very important factor not specifically addressed by any of the Conventions or Protocols is whether Palestine can use these international agreements to demand the return of cultural property that was taken prior to its becoming a signatory. Since none of the conventions address this issue, “the question of retroactive effect would be open for examination based on the potential customary character of the 1954 Hague Convention and its Protocols…..”187 An examination of other cultural property restitution agreements does not lend itself to support the retroactive restitution of cultural property. Instead, as was the case in Israel’s return of cultural property to Egypt after the return of the Sinai Peninsula, nations usually draw up their own bilateral agreement regarding the return of cultural property. Thus, the return of cultural property is an issue that seems to be dealt with most effectively at the bilateral agreement level.188

C. Bilateral Agreements

As mentioned above, there are several conventions on cultural heritage that contain articles regarding the return of cultural property. However, the majority of successful restitution cases have occurred through bilateral agreements with the existing international


187 Keane & Azarov, supra, at 4.

188 Keane & Azarov, supra, 4.
conventions as an influencing factor. One significant reason for the plethora of bilateral agreements on the return of cultural property is that the 1954 Convention allows parties to make separate agreements regarding any of the issues covered in the convention. Therefore, it is critical to any discussion of the restitution of Palestinian cultural heritage to examine what, if any, bilateral agreements exist in regard to this issue.

As with most issues between Israel and Palestine, the Oslo Accords are the main source of authority. In the Oslo II agreement, both parties agreed that any discussion of the return of archeological artifacts taken from the West Bank and Gaza would be discussed as part of final status negotiations. Thus, neither party is under any obligation to negotiation the restitution of Palestinian cultural heritage until they enter into final status negotiations.

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189 1954 Convention, supra note 1, at art. 24(1).

190 Oslo II, supra note 53, at annex II, art. 2(10).
VIII. STEPS FORWARD

UNESCO and other international organizations are investing many resources in order to build up the Palestinian Authority’s ability to protect its own cultural heritage.¹⁹¹ Most of these resources have gone into creating the draft Palestinian law for the protection of cultural heritage, which will provide a solid base of protections for cultural property once Palestine has control of its own territory. However, in the meantime, more resources and international pressure should be directed at getting the Draft Palestinian law passed. Additionally, international pressure should be placed on the Palestinian Authority to direct more funding to DACH thus enabling it to more effectively protect the cultural heritage that is under the Palestinian Authority’s control.

However the Palestinian government is not the only actor failing at its responsibility to protect Palestinian cultural heritage. With all of the international aid going towards developing the Palestinian draft law there is significantly less work being done to shift Israeli policies on Palestinian cultural heritage. The international community needs to put pressure on Israel to end its current practices and change its policies that can be directly identified as leading to the destruction of Palestinian cultural heritage.

Israel’s Al 1978 law, even with the recent amendments, still does not address the actual cause of illicit importation of Palestinian cultural property into Israel and beyond. New amendments to this law must be made so there is more accountability on where antiquities have come from. A law requiring Israeli Antiquity dealers to apply for export permits for each item sold would be a good first step. Israel must also put a check on the power of the Staff Officer in Area C. One way to do this would be to create the Joint Council proposed in Oslo II, and require its approval for any archaeological excavations by the Staff Officer. This would not only allow the Palestinians some say in archaeological activity in Area C, it would also fulfill the requirement of the 1954 Convention and the Oslo Accords for Israel, as an occupier, to work with the occupied government.

Another group that should be involved in this issue is the International Council of Museums (ICOM).¹⁹² The organization runs programs, such as the Art and Cultural


Heritage Mediation program. Through this program, ICOM acts as a neutral facilitator between museums and other parties to help find resolution to disputes involving cultural heritage. This type of mediation could be helpful in the case of the Herod Exhibit in the Israel National Museum. The exhibit consists of 50 artifacts excavated from Area C, which were taken without consultation of the Palestinian Authority. Furthermore, a refusal on the part of museums around the world to accept artifacts that have been illegally taken from the West Bank would put pressure on the Israeli antiquities community. Such pressure could lead to the antiquities community in Israel demanding the Israeli government change its policies of acquisition of Palestinian cultural heritage.

The international laws that currently exist for the protection cultural heritage could sufficiently protect Palestinian cultural heritage if they were fully implemented. However, Israel’s non-ratification of key conventions such as the Second Protocol and the 1970 Convention make it difficult to demand the Israeli government take further actions to protect Palestinian cultural heritage. Furthermore, the Palestinian Authority’s failure to pass an adequate law for the protection of Palestine’s cultural heritage or fund DACH makes it difficult to prevent and punish the destruction of Palestinian cultural heritage in Areas A and B. Thus, in lieu of Israel ratifying the Second Protocol and the 1970 Convention, bilateral negotiations between Israel and Palestine and key revisions to existing Israeli, as well as Palestinian, laws are the best hope for protecting Palestine’s cultural heritage. If both Israeli and Palestinian authorities continue to fail their duties to protect Palestinian cultural heritage, it seems the issue of restitution will become increasingly the only hope for Palestinians owning their own cultural heritage.

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IX. CONCLUSION

As this research shows, there are a multitude of laws in place for the protection of cultural heritage at the international level, bilateral level and national levels. Yet, due to the nature of international law, only some of these laws apply to the protection of Palestinian cultural heritage.

Until 2012, when Palestine became a signatory to the 1954 Convention, no international convention imposed a duty of protection of Palestinian cultural heritage on Israel. Now that Palestine is a co-signatory to the 1954 convention, Israel has a duty to protect its cultural heritage from destruction, illicit digging (archeological or otherwise), looting, and illicit exportation. If Israel is an occupier, they have a further duty to support the Palestinian Authority’s efforts to protect its own heritage. Furthermore, now that Palestine is a signatory to Protocol I, if Israel is an occupier, they must stop the exportation of Palestinian cultural heritage from occurring during the conflict as well as seize any illegally exported Palestinian cultural property discovered within its own territory. Under the Oslo Accords Israel has a duty to protect Palestinian cultural heritage from looting, development, and destruction. Israel also has a duty to try to prevent archeological artifacts from being stolen and to implement necessary procedures to prevent illicit transfers of Palestinian cultural property over its border. According to Israeli domestic law, the military Staff Officer in charge of area C has a duty to protect Palestinian Cultural heritage. Finally, Israeli Antiquities Authority inspectors have a duty to ensure artifacts discovered after 1978 are not sold on the legal market.

Since signing the 1954 Convention, Protocols I and II, and the 1970 Convention, the Palestinian Authority has a codified duty to protect its own cultural heritage. Under the Oslo Accords, the Palestinian Authority agreed to work with the Israelis to protect its cultural heritage from looting, development and illicit exportation. Furthermore, the Palestinian Authority agreed to create and enforce laws that punish and prevent the illegal trading of cultural property and the theft of archeological artifacts.

The international community, to the extent that members are co-signatories to the Conventions ratified by Palestine in 2012, has a duty to work to prevent the damage and destruction of Palestinian cultural heritage from acts such as pillage, theft and looting under
the various international conventions listed here. However, due to lack of concrete enforcement mechanisms, these duties are vague and generally not enforced.

As this paper shows, the legal framework in place for the protection of cultural heritage is not perfect. However, it does provide some very important protections. In the case of Palestinian cultural heritage, the current legal framework could significantly decrease the amount of cultural property being destroyed on a yearly basis. The main threats to Palestinian cultural heritage come from the lack of enforcement of the current legal framework by the Palestinian government, the Israeli government and the International community. Thus an ideal start to protecting Palestinian cultural heritage would be for the governments to fulfill their obligations under the various international conventions, bi-lateral treaties and domestic laws they are subject to. The Palestinian government would have the most to gain from such fulfillment. Increasing cultural heritage protections within the West Bank would lend support to their current requests to have several sites within Palestine designated as World Heritage Sites by UNESCO. The World Heritage site designations would help Palestine attract more tourism and thus increase revenue. The Israeli government on the other hand has almost no incentive to fulfill its obligations to protect Palestinian cultural heritage. As the continually increasing number of Israeli settlements in the West Bank show, the Israeli government is not concerned with protecting Palestinian’s connection to the land or their ancestors who have lived in this region for centuries. Instead, the actions of the Staff officer in charge of Area C show the true interest of the Israeli government, discovering Jewish cultural heritage in the West Bank and establishing an exclusionary history of its Jewish occupants.

Despite the numerous challenges to protection of Palestinian cultural heritage, there is still hope. First, the Palestinian Authority, with the help of UNESCO, is working to have several historical sites in the West Bank declared World Heritage sites under their protection, as opposed to Israel’s protection. Through this process they are able to reach


197 “Palestine.” UNESCO World Heritage Centre. Supra.
out to donor countries and request funding dedicated solely to the protection of Palestinian cultural heritage. Second, because a large number of Palestinian cultural heritage pieces are being illegally exported it may be possible to have them returned. As illustrated in the restitution analysis in this paper, now that Palestine has signed on to a number of cultural heritage protection conventions, the international community has significantly more duties to prevent the illegal exportation of Palestinian cultural heritage and to return cultural heritage that is discovered within their own territories’. Thus, Palestinians may find it easier to request the legal restitution of their cultural heritage than to try to force the Palestinian Authority and Israeli government to fulfill their duties of protecting the heritage. Furthermore, given the looting of the Iraq museum in 2003198 and the recent public destruction of Syrian cultural heritage by ISIS199 the issue of protecting such cultural heritage has gained a lot of attention and momentum in the international consciousness. Hopefully this awareness of the importance of cultural heritage and the current momentum to protect cultural heritage will transcend conflict lines and bring pressure on international governments to fulfill their duties to prevent the illicit exportation of Palestinian cultural heritage.

Palestinian cultural heritage is just one small piece of the Israeli Palestinian conflict that has been devastated by years of violence. However much of the damage and destruction has gone on unnoticed and unrecorded. Sadly, this means that most of the cultural heritage will never be recovered. That does not mean action now is useless, just urgent. There is still cultural heritage in Palestine that needs to be protected. If we, the global community and citizens of Palestine, continue to wait on the Palestinian and Israeli governments or the elusive ‘two-state solution’ to protect Palestinian cultural heritage it will be gone. Workable legal frameworks are in place; it is now up to citizens of the world to utilize the law in one of its fundamental capacities, holding governments accountable.


APPENDIX A: Oslo II division of Palestinian Territory

(Foundion for Middle East Peace map; http://fmep.org/)

Oslo II Map
Outlining Areas A, B, and C

West Bank
(Israeli occupied – status to be determined)

LEGEND
- Palestinian Cities
- Palestinian Villages
- Settlement and military areas, roads, State lands
- Israeli Settlement

0 5 10 15 kilometers
0 5 10 miles

Mediterranean Sea
Israel
Jordan Border
Dead Sea
XI. REFERENCES CITED


33. Lori F. Damrosch, Louis Henkin, Sean Murphy, Hans Smit, International Law Cases and Materials, (5\textsuperscript{th} ed. 1980).


36. Bruce Bower, Networks of plunder: archaeologists tracing the labyrinth of antiquities trafficking hope to shut it down or at least slow it up, Science News, Mar. 28, 2009, at 20.


