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THE LEGACY OF PALESTINE



The Legal Framework of Islamic and Christian Endowments in the Holy City of Jerusalem



The Legal Framework of Islamic and Christian Endowments in the Holy City of Jerusalem

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This study is part of the efforts PalVision puts in to preserve the religious, civilizational and cultural heritage of Jerusalem, within the “Irth Palestine” project, that works towards the protection of the Islamic and Christian cultural heritage in Jerusalem, funded by the European Union.

The opinions and views in this study belong solely to the researcher, and do not necessarily reflect or represent the position or opinion of PalVision or the European Union.







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PREFACE

This study seeks to review the international laws, regulations and agreements that regulate the affairs of Islamic and Christian endowments in the city of Jerusalem, in the hope of providing a reference study that offers the necessary legal assistance to the Palestinian public in general, and Jerusalemites in particular. The study also seeks to shed light on the responsibility of the international community towards the preservation of holy sites, and the religious and cultural heritage in the city of Jerusalem.

This study was prepared by the Palestinian Vision Foundation (PalVision), as part of the activities of the “IRTH” (Palestinian heritage) project aimed at protecting the Islamic and Christian cultural heritage in Jerusalem. The project is implemented by PalVision, in partnership with the Palestinian Academic Society for the Study of International Affairs (PAS-SIA), and ACT foundation for Studies and Alternative Means of Conflict Resolution, and funded by the European Union.

The “IRTH” project constitutes a central pillar of the Arab identity of Jerusalem, and its religious, historical, archaeological, cultural, social and economic components. The project seeks to empower the steadfastness of the people of Jerusalem, consolidate the Palestinian national narrative, and protect lands, real estate and property, in particular, Islamic and Christian endowments. The project also contributes to the documentation of the Israeli violations in the city, especially attempts to distort and falsify the historical narrative, and change the identity of the Arab city and its cultural landmarks.







The Legal Framework of the Islamic Endowments in Jerusalem

By: Adv. Khaled Zabarqa

INTRODUCTION

In the last century, the city of Jerusalem was the scene of exceptional events and circumstances that directly affected, and altered the reality of the Islamic endowments in the city. The laws regulating the provisions of the Islamic endowments in the city have diversified in line with the numerous regimes that ruled it in this period of successive events, beginning with the Ottoman rule, to the British Mandate, the Jordanian rule of the West Bank and Jerusalem, and up to the Israeli occupation since 1967.

In its broad sense, a legal system is “the set of general legal rules regulating a specific matter in a particular country at a specific time,” it also means “the set of procedures and rules upon which the state builds its ideas and principles and derives its law from”¹.

An Islamic endowment (waqf) means “tying up a mortmain property so that its produce or income may always be available for religious or charitable purposes”². In its narrower sense in terms of real estate, it’s real estate that has been legally endowed, and cannot be sold or transferred by the endower (waqif) or be inherited by any person³.

Thus, the legal system of the Islamic endowments in Jerusalem can be defined as: “a set of legal procedures and rules that regulate the provisions, affairs and transactions of the Islamic endowments in the city of Jerusalem”.

The theoretical importance of this research lies in the fact that the issue of the legal system of the Islamic endowments in Jerusalem is a profound legal issue, due to the distinctive significance of the properties of the Islamic endowments in the city of Jerusalem, given their religious and historical status on the one hand, and their considerable size and predominance throughout the city on the other hand. The percentage of Islamic endowment properties in the Old City is estimated at 67%, while the percentage of endowments in the city as a whole is about 80%. Statistical estimations indicate that the percentage of charitable waqf in the Old City is 30%, and the percentage of family waqf is 40%, added to that the area of the blessed Aqsa Mosque, as an entirely Islamic endowment.

Other statistics indicate that the total of Islamic charitable and family endowment properties in the Old City is 86%, given that the area of the Aqsa Mosque constitutes 21% of the Old City, while endowment properties in the Old City range between 60-65%.⁴

In addition, the issue of the legal system of the Islamic waqf in Jerusalem is the order of the day, due to the moral value of these endowments for Muslims in general, as they con-

1 Abbas Al-Sarraf, and George Hazboun. Introduction to the science of law, first edition, Amman - Jordan: Dal al-Thaqafa, 2008, p. 20. See also: Awad Al-Zoubi. Introduction to the science of law, third edition, Amman - Jordan: Dar Wael, 2007, p. 8.

2 Others defined it as: “a permanent or temporary confinement of money, for repeated use so that its produce or income may always be in a public or private aspect of charity.” See: Muhammad Qadri Pasha. The Law of Justice and Equity in Solving Endowment Problems, First Edition, Lebanon: Al Rayan Corporation for Printing, Publishing and Distribution, 2007, p. 25. See also: Abdel Jalil Ashoub. The Endowment Book, first edition, Cairo: Arab Horizons House, 2000, p. 9. Also: Mustafa Al-Zarqa. Ahkam al-Awqaf, first edition, Amman - Jordan: Dar Ammar, 1997, p. 34 and beyond.

3 Ikrima Sabri. Islamic endowment between theory and practice. The second edition, Amman-Jordan: Dar Al-Nafais, 2011, pp. 41-42

4 Hamad Youssef. The Islamic Endowments in Palestine from the Late Ottoman Era to the Present Day, Second Edition, Ramallah: Palestinian Ministry of Information, 2010, p. 237



stitute a major part of the religious and historical heritage of Muslims in the Holy City. This issue also raises an extensive legal, political and social controversy in the Jerusalemite community, especially after US President Donald Trump announced on December 6, 2017, his country's recognition of Jerusalem as the capital of the occupying power, and announced the "deal of the century", with all its direct consequences that affected the legal status of the Islamic endowments in Jerusalem. Likewise, this controversy, and the problems it entails, is also raised when discussing the laws established by the occupation in order to drain and confiscate endowment properties, or cause serious differences between members of the community for the same goal.

As for the practical importance of the research, it lies in the fact that the issue of the legal system of the Islamic endowments raises practical questions worthy of research and attention that affect the interests and rights of charitable and family endowments in general. The successive events which Jerusalem endured in the last century, led to the dispersion of these laws regulating the Islamic endowments, due to the instability and fluctuation in the political and administrative system in the city, and the enactment of different laws within a short period of time, which made it hard for researchers and those who deal with these laws.

Not only did the Israeli occupation deliberately create chaos with regard to the legislation governing the Islamic endowments, but also restricted the work of the Sharia courts and the Jordanian Islamic Endowments Department with regard to endowment affairs and management. In addition to limiting the jurisdiction with which endowment issues are handled between the Israeli and Jordanian Sharia courts on the one hand and allowing further interferences by regular public courts in endowment issues on the other hand.

No one denies that the endowments institution has stood as an impenetrable barrier to the occupation, preventing it from manipulating land and real estate, buying or disposing of it, given that these endowment real estates are tied up property, and their ownership cannot be transferred, and may always be available for charitable purposes that benefit the public. Therefore, the Israeli occupation found itself facing an obstacle that prevented it from achieving its goals and objectives in Judaizing the city of Jerusalem and having absolute control over its lands.⁵

Hence, the occupation, in order to achieve its goals of Judaizing the city, began to legislate racist laws that allow it to confiscate and expropriate the properties of Jerusalemites in general. The occupation also harnessed all the capabilities of the state, its institutions and tools, in the service of its main goal of controlling lands in Jerusalem in any way possible. These laws legislated by the occupation were numerous, including the Absentee Property Law, planning and building laws, expropriation laws, and the law of national parks and nature reserves, under which thousands of dunams of endowed properties and cemeteries were confiscated.

The multiplicity of laws that apply to Islamic endowments in the city of Jerusalem has made the issue of the legal system of the Islamic endowments a broad endless subject, complicating the research process even more. Therefore, this study mainly focuses on presenting the basic laws regulating Islamic waqf or those that have a direct impact on these endowments.

Perhaps the previous studies constitute one of the greatest difficulties facing the research-

⁵ In this same sense, see: Mahmoud Ashkar. *The Waqf and its Transactions at the Beginning of the Eighteenth Century Through the Records of the Sharia Court, Beit Al-Maqdis: Foundation for Reviving Heritage and Islamic Research*, 2008, p. 2 and beyond.





er with regard to the legal system of the Islamic endowments in the city of Jerusalem, as the specialized Arabic references are very few, which, at the same time, constitutes a greater incentive for research.

These matters necessarily prompt us to research the legal system that regulates the affairs of Islamic endowments in Jerusalem, and the impact the Israeli laws have on it.

A set of Jordanian laws- applied by Jordanian Sharia courts still operating in East Jerusalem in continuation of Jordan's historical role in the city (Section I)- are still applicable to the Islamic endowments in Jerusalem. In return, the Israeli occupation imposed another set of laws that are forcibly being applied to these endowments (Section II).

SECTION I: JORDANIAN LAWS REGULATING ISLAMIC ENDOWMENT AFFAIRS

The roots of the Sharia judiciary in Palestine extend to the Islamic conquest. This is demonstrated by tracing the historical establishment and work of the Sharia courts in Jerusalem (Subsection I), that are still under Jordanian administration (Subsection II).

Subsection I: the Establishment of the Sharia Courts in Jerusalem-Historical Overview

Sharia courts were established at the beginning of the Ottoman rule (1516 CE) in all the provinces that fell under its jurisdiction, including Jerusalem, and the Levant in general. The Sharia judiciary was characterized, at the beginning of the Ottoman Empire, by its general and comprehensive jurisdiction in all disputes, and its application to all subjects of the Ottoman Empire, as there was no other judiciary at the beginning of the Ottoman rule⁶. The Hanafi School was dominant back then and was applied to all transactions across the Ottoman Empire, including the Islamic waqf system.⁷

This situation lasted until 1839, or the so-called beginning of the era of regulations, when Sultan Abdul Majeed issued the reform decree, according to which, modern legal systems were kept abreast, and Islamic jurisprudence was codified in the modern legal style, which necessitated the establishment of regular courts in the state. Thus, litigation bodies multiplied in the Ottoman Empire, and the jurisdiction of the Shari'a judiciary became represented in matters of personal status for Muslims, and all matters related to Islamic endowments⁸. It can be said that, compared to other periods, endowment affairs and dealings during the Ottoman rule in Jerusalem, witnessed concrete stability, as the Ottoman Empire was concerned with organizing and documenting endowment matters, which was positively reflected on all affairs related to Islamic waqf during that period. A preoccupation with waqf properties was prevalent among Jerusalemites with a growing competition over real estate endowments and their transfer to various charitable causes. This can be evidently demonstrated by tracing endowment transactions during the Ottoman period

6 With the exception of matters relating to the personal status of non-Muslims who are foreign nationals, the jurisdiction over these matters was for courts affiliated with foreign consulates, church courts, and band councils. See: Abdel Karim Tawafsha. *A study on the reality of Sharia courts and the development of the applicable laws in Palestine* (published master's thesis), Nablus: An-Najah University, 2014, p. 12.

7 See: Muhammad Qadri Pasha. *The Law of Justice and Equity in Resolving Endowment Problems*, a previously mentioned source. See also: Muhammad As'ad Imam al-Husayni. *Al-Manhal Al-Safi fi Waqf and its provisions*, Jerusalem: Al-Wataniya Press, 1982, p. 10.

8 Previous reference, pp. 17-19.



in the records of the Sharia court in Jerusalem, where the subject of endowments and all its relevant issues constitute a prominent topic in these records⁹. Statistics indicate that 75% of lands owned by the Ottoman Empire in the 19th century were all tied to an Islamic endowment. These endowments were the most prevalent in the city of Jerusalem, as more than 2000 endowment deeds were recorded during the Ottoman period in Jerusalem, i.e. an average of 4-5 new endowments each year.

This system of regulation and documentation continued until the end of the Ottoman rule in Jerusalem. With the beginning of the British Mandate, things changed drastically, and the situation has shifted from organization to systematic chaos in all aspects of life. At the beginning of the British Mandate in Palestine in 1918, the British authorities maintained the structure of the country's judicial system with a set of amendments and changes made under the laws enacted by the Mandate. Accordingly, the Sharia courts continued to operate in Jerusalem with reduced powers that were limited to cases of Personal status of Muslims and Islamic endowments¹⁰. In addition, after the war on land ownership became public and no longer a secret as in the past, and in an effort to reduce the percentage of real estate endowments, and limit their perpetuated benefit to Muslims, the British authorities did not recognize the establishment of new Islamic endowments, unless they were registered in the Department of Lands (Tabu), in contravention of the provisions of Islamic Sharia, which permit the holding of a waqf verbally, or in writing, and acknowledgement before Sharia courts¹¹.

On 9 November 1920, an Islamic conference was held in Jerusalem, from which emerged the call for the establishment of the Supreme Islamic Council for the purpose of supervising Sharia courts, Islamic waqf and all religious affairs for Muslims during the British Mandate.

On 1 January 1922, the Supreme Islamic Council, headed by Haj Amin al-Husseini, became the body responsible for following up on the affairs of Islamic waqf in Jerusalem during the British Mandate period. This council was established at the initiative of honorable Jerusalemites who sincerely cared for the interests of their Islamic endowments¹². The British authorities recognized the competence of the Supreme Islamic Council as an independent authority and an Islamic reference to look into matters of endowments and other legal affairs of Muslims in Palestine¹³.

The main tasks of the Supreme Islamic Council included: managing and monitoring Islamic endowments, auditing, approving and submitting the budget to the government for review. The tasks also included appointing Sharia judges, the head of the Sharia Court of Appeal and its members, the inspector of Sharia courts, muftis, the director of endowments with the relevant officials, and entire teams whose work was related to Sharia. This in addition to observing the Public Endowments Committee and all other committees, managing and looking into all Islamic endowments, building evidence and proofs to substantiate and return them back to the Islamic Sharia Council, and applying the Waqif's conditions in disbursing the revenues of the said endowments¹⁴. The British Mandate government restricted the role of the Islamic Council and stripped it of its direct powers

9 See: Isaac Ritter. *Waqf in Jerusalem (1948-1990)* (Hebrew), 1991, p. 8, p. 35.
 10 See: Report on the Sharia Judiciary in Palestine - Challenges and Prospects, Ramallah: The Coalition for Integrity and Accountability - "Aman", Series 50 Reports, February 2012, p.1.
 11 See: Isaac Ritter, aforementioned reference, p. 7.
 12 see: Tayseer Jabara. *Studies in the Modern History of Palestine*, Palestine: Hebron University, 1980, p. 146 and beyond. And also: "A report on the Sharia judiciary in Palestine - challenges and prospects, aforementioned reference, p. 1.
 13 See Article (1) of the Law of the Supreme Islamic Sharia Council as issued by High Commissioner Herbert Samuel on 12/20/1921, published in the Official Gazette on 1/1/1922.
 14 Article (8) of the system of the Supreme Islamic Sharia Council





into practice. The Council was prevented from taking any executive decisions without informing the British Mandate Authority and obtaining its approval¹⁵.

However, there were many attempts by the Supreme Islamic Council to play a more influential independent role, by trying to work around the restrictions of the Mandate authorities at the time. Especially in land and real estate purchase issues, through which the Council sought to purchase as many lands as possible, to prevent them from being secretly sold to Jews through 'sweetheart deals', and to thwart any other sales deals, particularly the properties surrounding the Aqsa Mosque, and the Al-Masha'a real estate (joint ownership of a property)¹⁶. This in addition to representing the Islamic Council of Muslims in Palestine, and acting as a leading national political leadership at the time.

The British Mandate authorities did not accept this patriotic role which the Islamic Council was playing. This eventually led them to remove Haj Amin al-Husseini from all his positions in the Supreme Islamic Council in October 1937. The powers of the Supreme Islamic Council were transferred to a government committee, headed by the British Judge Green and consisted of three members, under the Emergency Regulations (Islamic Endowment) of 1937¹⁷. This gave rise to serious tension in the political situation in Palestine, paving the way for the Israeli occupation and the regional wars that ensued at that time.

In 1948, the Israelis occupied the western part of Jerusalem, declaring the establishment of their state, and subjecting the areas inside the green line and west Jerusalem to Israeli laws. On the other hand, the Jordanian Parliament declared complete unity between the two banks of the Jordan in 1950, after which, the judicial and legal system in the West Bank and East Jerusalem became under the Hashemite Kingdom of Jordan (Subsection II).

Subsection II: Jurisdiction of the Jordanian Sharia Courts in Jerusalem

The Hashemite Kingdom of Jordan took over the supervision of Islamic endowments and Sharia courts after the end of the British Mandate in Jerusalem and the West Bank, where it applied the Jordanian Endowment Law No. 25 of 1946¹⁸. This situation continued even after the 1967 war (Naksa) and the occupation of the West Bank on 5 June 1967. Endowments records dating back to the Jordanian rule of Jerusalem (1948-1967) indicate that 16 family endowments were recorded at that time¹⁹.

After the occupation of Jerusalem, the Jerusalemites became aware of the seriousness of the situation and the religious and demographic war on the ground, which prompted them to endow more of their real estate. Legal records indicate that 90 new endowments (including 25 charitable endowments) were registered between 1967 - 1990, an average of four new endowments each year²⁰.

The Jordanian Department of Endowments remained in the West Bank until the preliminary stage that preceded the arrival of the Palestinian Authority (PA), when a decision was issued on 3 July 1988 to disengage the two banks, and recognize the Palestine Liberation

15 This is demonstrated through the extrapolation of many articles relating to the system of formation of the Supreme Islamic Council, where the British government stipulated approval and ratification of many of these powers granted to the Council in matters related to appointments and others.

16 See: Isaac Ritter, *Waqf in Jerusalem (1948-1990)*, op.cit., p. 36.

17 See: Isaac Ritter, *Waqf in Jerusalem (1948-1990)*, op.cit., p. 12.

18 A number of amendments were made to this law, in 1962, the Endowments and Islamic Affairs Law No. (16) of (1962) was adopted to replace it, and in 1966, the Endowments and Islamic Affairs Law No. (26) of (1966) was adopted, and remained applicable in the West Bank, with several subsequent modifications. In Jerusalem, Law No. (26) of (1966) of 2001 continued to be applied, and was replaced by the Law of Islamic Endowments, Affairs and Sanctities Law No. 32 of (2001).

19 See: Isaac Ritter, *Waqf in Jerusalem (1948 - 1990)*, previous reference, p. 38.

20 Ibid., p. 39.



Organization (PLO) as the sole legitimate representative of the Palestinian people. As a result, the administration of Sharia courts and the Islamic Waqf in the West Bank was transferred from Jordan to the PLO when the Palestinian National Authority was established in 1994. The decision excluded Islamic and Christian holy sites in Jerusalem, including Sharia courts and the Islamic Waqf, which continue to be under the Kingdom of Jordan to this day.

The declared intention of excluding Jerusalem from the disengagement decision was to keep it safe from the Zionist danger in the event of a vacuum of sovereignty, especially since the occupation had repeatedly used this pretext to perpetuate its occupation of the West Bank, and illegally annexing Jerusalem as its one and eternal capital²¹. This is what the disengagement decision stated in its text: “Given the eternal specificity of Jerusalem, the force majeure circumstances surrounding it, and the continuation of the Hashemite role in caring for it and protecting its holy sites from any danger or tampering, and for fear of exploiting any vacuum that may arise, the Jordanian government, based on the Hashemite religious and historical jurisdiction over the holy sites, decided to maintain the Jordanian legal and administrative responsibility over the Islamic endowments, affairs and sanctities, and Sharia judiciary in Jerusalem”²²

The Israeli occupation has implicitly recognized Jordan’s historical role in Jerusalem in the Wadi Araba Peace Treaty held on October 26, 1994, of which Article (9/2) states: “In this regard, in accordance with the Washington Declaration, Israel respects the present special role of the Hashemite Kingdom of Jordan in Muslim Holy shrines in Jerusalem. When negotiations on the permanent status will take place, Israel will give high priority to the Jordanian historic role in these shrines.”

This role was also confirmed by the “Guardianship and Sovereignty” agreement concluded between the Hashemite Kingdom of Jordan and the PLO, signed by King Abdullah II and Palestinian President Mahmoud Abbas, on March 31, 2013. As stated in its preface: “the continuous patronage of holy sites by the Hashemite Kingdom of Jordan, enhances its ability to defend Islamic sanctities and safeguard Al-Aqsa Mosque.”

The first clause of Article II of this agreement, stipulates that the Jordanian guardianship of the holy places in Jerusalem, aims to “respect and preserve their religious status and significance; reaffirm the proper identity and sacred character of the Holy Sites; and respect and preserve their historical, cultural and artistic significance and their physical fabric”; that includes representing the interests of the Holy Sites in relevant international forums and competent international organizations and overseeing and managing the institution of Waqf in Jerusalem and its properties in accordance with the laws of the Hashemite Kingdom of Jordan. The third clause of Article II stipulates that “the Palestinian Liberation Organization and the Palestinian National Authority recognize the role of the King of the Hashemite Kingdom of Jordan and undertake to respect it”²³.

The Jordanian Court of Cassation confirmed this with the decision issued by its Plenary on 15 January 2017, as follows: “The Sharia Court in Jerusalem, shall follow the Jordanian Sharia judicial system, in terms of its procedures, administration and rulings, based on the Hashemite guardianship of the holy places in Jerusalem, and the contents of the peace treaty between Jordan and Israel. The power of attorney issued by the Jerusalem Sharia Court, in light of the conditions and circumstances that accompanied its issuance, should

21 See: Abdel Karim Tawafsha. A study on the reality of Sharia courts and the development of the laws in force in Palestine, published Master’s thesis, previous reference, p. 27.

22 For more details see: Abdul Rahman Al-Barghouti, The Decision to Dissolve Jordan’s Legal, Administrative and Financial Relationship with the West Bank, Published Master’s Thesis, Birzeit University, 2008 CE, pp. 60 and beyond

23 See: The Custody and Sovereignty Agreement concluded between King Abdullah II and Palestinian President Mahmoud Abbas on March 31, 2013.





be treated in a similar way to the power of attorney issued by any notary public in Jordan, in order to facilitate, organize and conciliate dealings concerning Jerusalem area²⁴.

The Kingdom of Jordan exercises this role in the city of Jerusalem through the following bodies:

1. The Shari'a Court, with its former headquarters in Salah al-Din Street, in addition to the new headquarters recently established in Wadi al-Joz.
2. The Sharia Court of Appeal, located in the Aqsa Mosque compound.
3. Office of the Chief Justice, also located in the Aqsa Mosque compound.
4. Islamic Waqf and its subsidiary departments, its main headquarters at Bab Al-Nazir.
5. The Islamic Endowment Council

These courts and official departments apply Jordanian law to Islamic endowment transactions, including amendments approved by the Parliament of Jordan. The law currently in force is the Law of Endowments, Islamic Affairs and Holy Places No. 32 of 2001²⁵.

By reviewing the most essential provisions of this law, waqf was defined as: "abstaining from using owned in-kind property and allocating its benefits for the good, even if delayed". Charitable waqf is abstaining from using owned in-kind property and allocating its benefits for the good, to begin with. Family "Dhurri" waqf: abstaining from using owned in-kind property and allocating its benefits to a specific person or persons, and their offspring thereafter and then to a party of good (charity) when the persons allocated for have all gone²⁶.

Article (3) of the law has expanded the concept of Islamic endowments, affairs and Sanctuaries, as follows: "The term (Islamic endowments, affairs and holy places) means the following: 1. Movable and immovable land, real estate and property endowed to an endless charitable cause, and includes mosques, shrines, pilgrims' houses, Islamic cemeteries designated for burial in which burials are allowed and prohibited, 2. Matters related to da'wah, (preaching), Islamic advice and guidance 3. Matters related to the Holy Qur'an, the affairs of Islamic centers and the role of the Holy Qur'an and Hadith, its memorization and education centers 4. Affairs of Sharia institutes, schools and orphanages sponsored by the ministry 5. Ifta' affairs 6. Hajj and Umrah affairs.

Article (4) of the law emphasized that one of the ministry's objectives is to encourage charitable endowments to various charitable bodies, preserve and expand endowment funds, manage their affairs, and use their revenue to support parties designated by the waqif.

In conclusion, this law requires that endowed properties and lands are registered in special bonds as Islamic charitable waqf, in a way that indicates that the land is actually a charitable waqf, under the responsibility of the Ministry of Endowments, bound to the endowment authority and any conditions mentioned by the waqif in the endowment deed²⁷. The law has also prohibited the non-applicability of statutory limitations with regards to the waqf²⁸.

24 See the Cassation Decision in Case No. (2575/2016) - Public Authority - issued on 1/15/2017.

25 For more details on the Jordanian legislations related to Islamic endowments, see: Munther Abdel Karim Al-Qudah. Provisions of the Waqf - A comparative legal study between Sharia and law, Amman - Jordan: House of Culture for Publishing and Distribution, 2011, p. 178 and beyond.

26 See Article (2) of the Law of Endowments, Islamic Affairs and Sanctuaries No. 32 of 2001.

27 Article (14) of the law

28 Article (15/a) of the law



The law stipulated that the family waqf (Dhurri) does not conflict with the provisions of inheritance in Islamic law as prescribed in the applicable personal status law²⁹. The Shari'a court applies this text by not registering waqf endowed to males without females within first-generation offspring, while this is permissible with the other generations of offspring, as established in the jurisprudence of endowment to males without females, which has been applied to many deeds of endowment in Jerusalem for a long time.

An official public institution for the development of endowments was established under the same law, called the Endowment Funds Development Corporation, which enjoys a legal personality status, with financial and administrative independence³⁰.

Finally, through Article (7/D), the law restricted the substitution of waqf property (istibdal), so that the Waqf Council is the competent authority to approve the substitution of endowment real estate, after obtaining permission from the competent Sharia court in the presence of a legitimate justification³¹.

Despite all this, the Israeli occupation does not officially recognize the Jordanian Sharia courts, nor their rulings. This is due to two reasons: one is historical, as the judges of these courts refused to work under the Israeli Ministry of Religion when East Jerusalem was occupied in 1967, followed by the Supreme Islamic Council taking over at that time. The other is legal, which is the non-recognition of these courts as official courts in the Israeli judicial system based on decrees by the Israeli authorities and judicial systems. Among the practical obstacles that hinder the registration of endowments before the Jordanian Sharia courts, is the lack of ownership documents of real estate in East Jerusalem, as most Jerusalemites rely on ancient historical deeds to prove their ownership of their property with the absence of recent or conclusive Tabo records in East Jerusalem. Many families lost these historical documents as a result of wars, and at other times, these properties were subject to several transactions and sales' contracts, which makes it hard in most cases to trace the ownership chain and identify the heirs.

The official authorities require the ratification of judgments and decisions issued by the Jordanian Sharia courts before the Israeli Religious (rabbinical) courts, in order for them to have an executive status, as Israelis do not recognize the Jordanian courts as official courts in the judicial system. Examples of that include: marriage contracts, divorce arguments, endowment deeds, arguments for appointing and dismissing guardians and other transactions issued by the Jordanian Sharia Court.

Similar to many cases in the past, the Jordanian Sharia court would appoint a specific guardian to a given family waqf, while the Israeli religious court would appoint another guardian to the waqf at the same time. For example, on February 6, 1974, the Jordanian Sharia court appointed a member from the Nashashibi family as a guardian to the Yamli³² waqf, two weeks later, the religious court in Jaffa appointed two other people to be guardians of the same waqf. There have been many past and current examples³³ of similar cases, but the situation has generally changed in recent years, as the judges of the Israeli religious courts have grown accustomed to confirming the guardianship decisions issued by the Jordanian Sharia court, except for some cases, in which there is a dispute between the beneficiaries of the endowment over the identity of the guardian. The confirmation is

29 Article (20) of the law

30 Article (26) of the law. See: Munther Abdul Karim Al-Qudah. Endowment provisions - a comparative legal study between Sharia and law, previous reference, p. 187 and beyond

31 Other laws that are applied include Law No. 32 of 1952 for the Reconstruction of Al-Aqsa Mosque, and Law of the Hashemite Fund for the Reconstruction of the Blessed Al-Aqsa Mosque and the Dome of the Rock No. 51 of 2007.

32 One of the existing family endowments in the city of Jerusalem

33 Different guardians were appointed in 1971 for the Sheki Makki Waqf, and the Nashashibi Waqf, in 1974. See: Isaac Ritter, previous reference, p. 17.





carried out in accordance with Article 1738, which states: “Court records shall be enforced if they prove to be free from corruption and fraud”. The judges decide to confirm the guardianship decisions, justified by the fact that they are compatible with the provisions of the Islamic Sharia, and that they are issued by the ummah’s judges and scholars, and that they are documents to which the court ascribes a great deal of importance and credibility, as they form a strong basis for evidence. These courts considered that the Jordanian Waqf has an official status in the endowment cases, including guardianship cases³⁴.

Islamic cemeteries is one of the issues that the occupation has consistently violated and usurped. The Ma’man Allah cemetery is the best testimony to that, as the occupation authorities set up a museum on the cemetery’s land after bulldozing and exhuming its graves. The Supreme Court rejected the objections, on the grounds that the interest of the living takes precedence over the interest of the dead, and that the construction of the museum which they called the “Museum of Tolerance”, is a project of national and international importance, and that the authorities should only ensure that the deceased are respected during excavation and construction through the use of means that cause nominal damage to the graves³⁵. Bab al-Rahma cemetery is a concrete example of these violations; as the occupation is currently confiscating large parts of it, and preventing burials in order to convert it into public green places in accordance with the planning and building laws and the National Parks and Nature Reserves Law of 1998.

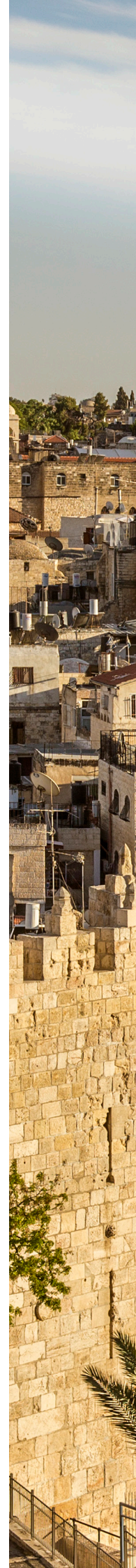
This occupier behavior is illegal, and clearly violates the Jordanian Endowment Law, of which Article (17) considers every land endowed for the burial of deceased Muslims, or allocated for that purpose by any authority, as a valid charitable waqf, and must be registered accordingly, regardless if it’s included or excluded in the settlement activities, or if it’s publicly or privately owned. This calls for a clear official position to prevent the occupation from violating the sanctity of deceased Muslims and their endowments.

In addition, the Israeli occupation impedes and restricts the work of the Jordanian Waqf in Jerusalem, especially in the Aqsa Mosque, which is subjected to daily and repeated violations. The occupation clearly seeks to transform this role into a strictly formal one, and change the status quo³⁶, which requires greater efforts in exercising the Jordanian role and stressing its guardianship of the endowments affairs and holy sites in Jerusalem. The occupation’s restrictions can be vividly seen when researching the other Israeli laws imposed upon the Islamic endowments in Jerusalem (Section II).

34 See: Appeals No. 45/66 and 93/95, issued by the Supreme Court of Appeal in Jerusalem. And see: Appeal No. 254 and 280/2012 issued on January 31, 2013.

35 Case No. 52/06, Israeli Supreme Court, October 29, 2008.

36 Pronounced “status kafu” in Hebrew.







SECTION II:

ISRAELI LAWS IMPOSED UPON ISLAMIC ENDOWMENTS

The Israeli occupation imposed a set of laws that apply to Islamic endowments. Some of these laws are (generally Islamic) applied through the Israeli religious court (Subsection I), including a set of man-made laws through which the occupation aimed to confiscate endowment properties and rob them from their owners (Subsection II).

Subsection I: The jurisdiction of Israeli Religious Courts in regulating the affairs of Islamic endowments

In 1948, the Israeli occupation, like any occupying force, legally recognized the status quo in Jerusalem and Palestine, which meant the continued enforcement of all previous legislations. The occupation provided formalistic recognition of the jurisdiction of the Shari'a courts and applicable laws, according to the Decree of Authority and Judicial Regulations of 1948³⁷, of which Article (11) states: "The law that was in force in (Israel's territory) on May 14, 1948, continues to be applied in a manner that does not contravene this decree, and other laws issued by the Interim State Council. It can still be applied in line with the issued laws and the amendments emanating from the establishment of the state and its powers". Article (17) stipulated that: "As long as a new law relating to the courts is not enacted, the courts will continue to operate within the state in accordance with the powers granted to them by law."

Following the occupation of East Jerusalem in 1967, the occupation also attempted, through the Ministry of Religions, to impose the Israeli law on the residents of East Jerusalem. In particular, the occupation attempted to separate the Sharia courts in East Jerusalem from the Jordanian administration and the West Bank. It also tried to force the existing Sharia judges to take an oath before the Israeli president to abide by laws issued by the Knesset that violate the Sharia (such as laws that determine the age of marriage, or laws that interfere with endowments), and report to the Israeli Religious Court of Appeal. The occupation also tried to interfere in the management of validated Islamic endowments, through the establishment of a tripartite committee to follow up on their affairs³⁸, as well as an attempt to interfere in religious sermons and lessons in the mosques of Jerusalem. However, these attempts were unsuccessful, as the Jerusalemites boycotted the Israeli Ministry of Religions, and established a higher authority to follow up on these affairs, which is the Supreme Islamic Authority headed by Sheikh Abdul Hamid al-Sayeh, and included Sheikh Hilmi al-Muhtasib, Sheikh Saad al-Din al-Alami, Sheikh Saeed Sabry, Anwar Al-Khatib, Anwar Nusseibeh, Fouad Abdul-Hadi, Ali Al-Taziz and other religious, political and legal figures in Jerusalem. On the other hand, the occupation did not officially recognize this body, and used this reason to exile Sheikh Abdul Hamid al-Sayeh, in addition to his patriotic and political stands in general³⁹.

The Israeli religious courts were affiliated with the Ministry of Religions at the beginning of the Israeli occupation, where the Minister of Religions - at that time - established four religious courts in occupied Palestine (the Court of Nazareth, Acre, Jaffa, and the Central District). In 1988, an Israeli religious court was established for Jerusalem, after dealings were

37 Issued on May 21, 1948, and published in the Official Gazette No. 2, p. 1

38 The occupation tried to impose this by claiming that the law enacted by the British Mandate in this regard was still in effect, namely the Emergency Regulations (Islamic Endowment) Act of 1937, according to which the role of the Supreme Islamic Council was banned, and the management of endowments was transferred to a tripartite committee affiliated with the government.

39 See: Isaac Ritter. *The Waqf in Jerusalem (1948 - 1990)*, previous reference, p. 15, p. 20 and beyond.



conducted in Jaffa Court in the past. On February 21, 2001, the affiliation of these religious courts was transferred to the Ministry of Justice in the Israeli government⁴⁰.

The Israeli religious courts have jurisdiction over the affairs of the Islamic waqf and its internal management. These courts derived this jurisdiction from the decree of the Palestine Constitution that was enacted during the British rule, of which Article (52) stipulated that: "... the Sharia courts have exclusive jurisdiction to consider issues related to the establishment of a waqf, or the internal management of a waqf that was established for the benefit of Muslims before the Sharia courts..."⁴¹.

This jurisdiction in waqf issues was also defined by Articles (7) and (8) of the Ottoman Code of Shari'a Procedures of 1333 AH, which is still in force in Shari'a courts⁴².

Thus, the Sharia courts have exclusive jurisdiction over the establishment and internal management of waqf, meaning that such cases may not be submitted to regular (civil) courts. In the event that it is submitted to regular courts, these courts must dismiss the case for lack of substantive jurisdiction.

The purpose of establishing a waqf is to register its deed and pass a relevant judgment before the Sharia court. Whether for the first time, or confirming a previously established waqf and ruling its validity, these cases have the exclusive jurisdiction of the Sharia courts that cannot be contested by any other judicial authority.

The cases related to the internal management of the waqf are between the guardian of the waqf and its beneficiaries. Such cases include appointment and dismissal of the guardian, guidance and accountability, entitlement, as well as requests and permissions submitted by the guardian to the Sharia judge, including permission to restore the property or build on the waqf land, long lease, and others.

Sharia Courts have no jurisdiction over cases related to the external management of an endowment, including cases of usurpation of the endowment which are under the jurisdiction of regular courts. The same applies to property claims which purpose is to decide on the issue of whether the disputed property is an Islamic waqf or not. These are also considered by the regular courts⁴³. However, in these cases, the parties may reach an agree-

40 Quoting from the official website of the Israeli Sharia Courts: <http://www.justice.gov.il/Ar/Units/TheShariaCourts/Pages/About.aspx>

41 See: Iyad Zahalka. Guide in the Sharia Judiciary, Publications of the Bar Association in Israel, p. 257 and beyond

42 The Sharia courts had absolute substantive powers over Muslims who are citizens of the state and foreign Muslims, provided that the latter, according to the laws of their homeland, are subject to the authority of its Sharia courts, in the following issues:

1. Establishment and internal management of endowments 2. Guardianship. 3. Will and inheritance. 4. Prohibition, its removal and maturity. 5. Absentees. 6. Marriage, dowry, divorce, separation, and annulment of marriage. 7. Parentage and custody. 8. Expense issues. However, over time, significant changes have occurred in the powers of the Sharia courts, the most important of which are the following:

Pursuant to Amendment No. 5 of the Family Affairs Court Law, of 2001, the jurisdiction in personal status cases for Muslims, in the matters set forth above, has become a parallel jurisdiction to the Shari'a court, and to the Family Affairs Court, except for marriage and divorce cases, which remained subject to absolute jurisdiction to the Sharia Courts.

Pursuant to Article 155 of the Law of Succession Act of 1965, the jurisdiction of Sharia courts in inheritance cases has been reduced, as two prerequisites for this power have been stipulated: (A) the written consent of all "those involved in the matter according to the Succession Law of 1965." (B) The shares of minors, if any, in the estate shall not be less than their shares under the law of succession.

The Sharia courts were granted powers parallel to that of the Family Affairs Court, according to the following two laws: Prevention of Domestic Violence of 1991, and the Law of Financial Relations between Spouses of 1973.

It is noteworthy that the Sharia courts work in the field of hearing and recording a change of religion to Islam (conversion to Islam), according to the decree of the religious community (change).

Quoting from the official website of the Israeli Religious Courts: <http://www.justice.gov.il/Ar/Units/TheShariaCourts/Pages/About.aspx>

43 The Israeli Supreme Court stresses that the jurisdiction of the Sharia courts is limited to the internal management of the endowment. In many cases, the Sharia courts were prevented from considering disputes involving the endowment and any third party except those entitled to it, and the decisions of the courts issued in those disputes were nullified as issued by





ment before the regular court, to refer the matter to the Sharia court to decide the type of ownership of the property, whether it is an Islamic waqf or privately owned.

The decisions of the Sharia court are appealed before the Supreme Sharia Court in Jerusalem. The subject-matter jurisdiction is considered one of the issues related to public order, and the court may raise it on its own in all types of cases, including waqf cases⁴⁴.

These Sharia courts apply the “The Law of Justice and Equity to Eliminate Endowment Problems” by Muhammad Qadri Pasha, to waqf cases. This book arranges the jurisprudential provisions of waqf in the form of legal articles. It is characterized by its simplified codified style in presenting waqf provisions based on the Hanafi school using the codification methodology, so that the Sharia provisions are arranged in (646) consecutive articles, divided into seven chapters:

- Chapter 1: the definition of waqf, its ruling, conditions, Sunnah, the eligibility of the Waqif, what is permissible to sell and those it’s endowed to.
- Chapter 2: the conditions that the endowers may require.
- Chapter 3: the mandate of the waqf and the conduct of the caretaker.
- Chapter 4: leasing the waqf
- Chapter 5: sharecropping, rent, vacuity payment and others
- Chapter 6: construction of endowed properties
- Chapter 7: claims, acknowledgements and testimonies⁴⁵.

These courts also apply Judicial Decree No. (1): “Reaffirming the sanctity of Islamic holy sites and preventing the issuance of fatwas otherwise”, which is a set of binding instructions issued by the President of the Sharia Court of Appeal, His Excellency Judge Ahmed al-Natour on June 21, 1994.

This judicial decree was issued after the occurrence of many legitimate abuses to the properties of Islamic waqf, and for the purpose of preventing attempts to exploit the Sharia courts in bad faith, in order to control or replace the endowment’s property, or change the purpose assigned to it, as in mosques and cemeteries. The decree includes five orders as follows:

1. Forbidding local Sharia judges from issuing fatwas that would allow the use of waqf properties for purposes other than their original ones, especially mosques, even if they were destroyed and Muslims disagreed about them, as well as cemeteries even if they were closed or deserted.
2. Preventing the judge from approving offers or suggestions related to the use of waqf lands, as well as preventing him from considering any transaction that might affect the waqf’s specifics, such as selling, leasing, mortgaging or substituting, or permission related to the use of the waqf.
3. Holding the guardians accountable once every six months and preparing the relevant records.
4. Sharia courts shall not appoint guardians until after their placement before the Sharia Court of Appeal. The Court of Appeal shall not approve the appointment of

a non-competent party. See: Case No. 52/06, Israeli Supreme Court. Case No. 4599/09 dated 06/21/2009, and the decisions mentioned there.

⁴⁴ See: Mithqal Natour. “The System of Establishing the Shari’a Court of Appeal,” *Al-Maree in Shari’a Law*, p. 80.

⁴⁵ See: Muhammad Qadri Pasha. *The Law of Justice and Equity in Resolving Endowment Problems*, previous source.

any guardian unless he is of good conduct and has no criminal record.

5. All judges are bound to maintain the eternal inviolability of Islamic cemeteries and mosques.

In contrast to the laws that formally regulate waqf provisions, the occupation imposed another set of laws aimed at appropriating endowment properties (Subsection II).

Subsection II: Israeli laws aimed at confiscating endowment properties

In 1950, the Israeli occupation enacted the “Absentees’ Property Law of 1950”, which replaced the “Emergency Regulations: Absentee Property” from 12/12/1948. The first article of the absentee law defines it as:

1. A person who was the legal owner of any property situated in the area of Israel, or enjoyed it or held it, whether by himself or through another, during any period of time between November 29, 1947 and the day on which the state of emergency -declared by the Provisional State Council on May 19, 1948- ceased to exist, and who at any time during the said period:
 - Was a national or citizen of Lebanon, Egypt, Syria, Saudi Arabia, eastern Jordan, Iraq, Yemen; or
 - Was in one of these countries or in any part of Palestine outside the area of Israel, or
 - Was a Palestinian citizen and left his ordinary place of residence in Palestine for a place outside Palestine before September 1, 1948, or a place in Palestine held at the time by forces that sought to prevent the establishment of the State of Israel, or fought against it after its establishment.
2. “A body of persons who, at any time during the period specified in paragraph 1, was a legal owner of any property situated within the area of Israel; or enjoyed or held such property, whether by itself or through another, and all the members, partners, shareholders, directors or managers of which are absentees within the meaning in paragraph 1, or the management of the business of which is otherwise decisively controlled by such absentees, or all the capital of which in the hands of such absentees”.

In this way, the majority of the properties of Islamic waqf, located in western Jerusalem and the occupied Palestinian territories in 1948 CE, were considered “absentee properties”, on the pretext that the person responsible for managing these Islamic endowments - the Supreme Islamic Council and its members, in addition to the guardians of family endowments - are absent according to the law. Thus, the management of these confiscated Islamic endowments was transferred to the Custodian of Absentee Property.

A question arises as to how the Islamic Council - which has an independent legal personality - is considered absent according to the law, especially since the Islamic waqf properties were not owned by the Supreme Islamic Council. Rather, the waqf is completely independent of the person who endowed it and his offspring, and therefore refers to the rule of God Almighty, or the endower or the endowed due to a disagreement between the jurists⁴⁶, while the role of the guardian of the endowment - the Supreme Islamic Council in this case – is solely administrative. If the members of the Supreme Islamic Council are

46 Imam Abu Hanifa defined the endowment as “detention of a property so that its produce or income may always be available for charitable purposes”. While the two companions (Muhammad and Abu Yusuf) defined it as: “detention of a property owned by God Almighty to benefit those He loves”. See. Dr. Ikrima Sabri, *The Islamic Endowment between Theory and Practice*, previous reference, p. 27 and beyond.





absent according to the interpretation of the law, then God Almighty is present if we consider the first jurisprudential opinion, and the those to whom the waqf is endowed are still present, if we consider the second jurisprudential opinion.

The reality indicates that the Israeli occupation has sought to dismantle the Supreme Islamic Council for fear of repeating the scenario of Haj Amin al-Husseini, who established a comprehensive national framework that played a national and political role in the country. The occupation has also sought in its governance to attract direct legitimacy through direct dealings with individuals in all matters⁴⁷.

In 1965, the Israeli occupation amended the provisions of the Absentees' Law, so that the law allowed the Israeli government to appoint a committee of trustees to administer the endowments in the cities inhabited by Muslims inside the occupied Palestinian territories, and in which there are Islamic endowments. The Custodian of Absentees' Property – at his discretion – may transfer the waqf lands -which he controls- to the Committee of Trustees. This in addition to considering the endowment property, after this transfer, free from any restriction or condition, including the terms of the endower. This contradicts the legal provisions of the endowment, although the rule of these conditions is the normative statement⁴⁸. Noting that Jerusalem was excluded from this amendment.

Based on these considerations, the occupation sought to dismantle any entity that manages endowments in order to facilitate the tampering of relevant laws, paving the way for controlling the Islamic waqf lands, by granting the authority to manage these endowments to the Custodian of Absentees' Property, who can sell these properties to the Jewish National Fund (The Keren Kayemeth) or the Development Authority (Ha Rashut Habituah), and the local authorities according to the Development Authority Law of 1950⁴⁹.

For example, according to the Absentees' Property Law, about 15,000 dunams of land belonging to the "Abu Midian Al-Ghouth Waqf" was confiscated, which constitutes the entire area of the village of Ein Kerem. The occupation built residential neighborhoods for Jews, and named it (Kiryat HaYovel) settlement. This in addition to the Yad Vashem Hospital and Museum, where the occupation commemorates the Holocaust on the ruins of usurped Islamic endowments, and this in itself demonstrates the occupation's violation of the laws in force to protect property and endowments, and the occupation's attempt to adapt legal procedures to serve political agenda. The Israeli Supreme Court also decided to confiscate the Hussein waqf in Jaffa in favor of the Custodian of Absentees' Property in 1996, considering that the beneficiaries were residing in East Jerusalem in 1948, outside of Jaffa, which was considered a hostile territory (as east Jerusalem was under Jordanian rule). The ownership of the waqf was transferred to the Custodian of Absentees' Property⁵⁰. The danger of the Absentees' Property Law with regards to Islamic waqf in Jerusalem, is particularly evident when talking about land settlement laws that the occupation intends to implement in East Jerusalem until 2025.

On May 13, 2018, the occupation government issued Resolution No. (3790) entitled "Reducing the Social and Economic Gap, and Economic Development in East Jerusalem." Article 6 of the resolution includes the government's instruction to the Ministry of Justice to begin its work on land settlement and registration in East Jerusalem, so that at least 50% of land is settled and registered by the end of 2021, and the entire task is completed by the end of 2025.

47 Hamad Youssef. *The Islamic Endowment in Palestine from the Late Ottoman Era to the Present Time*, previous reference, p. 126.

48 Isaac Ritter. *The Waqf in Jerusalem (1948-1990)*, previous reference, p. 14.

49 The Israeli Development Authority (Land Transfer) Law of 1950, issued on August 9 1950 and published in the Official Gazette No. 75 p. 278.

50 See Case No. 6452/96, Israeli Supreme Court, 6/18/2001.



The occupation government allocated a budget of 50 million NIS for this project alone. In addition, a committee was set and headed by the Director of the Ministry of Justice, and included a representative of the Ministry of Finance and the Presidency of the Government, the Director of Land Registration, the Director of the Ministry of Jerusalem, the Map Center, the Director of Planning and Construction, and the Director General of the Israeli occupation municipality in Jerusalem. The committee's mission is to follow up on the implementation of this project and submit reports on its progress⁵¹.

It is known that about 90% of properties in East Jerusalem did not see any settlement and registration works until 1967. The occupation, after occupying and illegally annexing East Jerusalem, did not complete the settlement works that the Jordanian government started with regards to these lands between 1948 and 1967, but rather froze and nullified these works until 2018 motivated by political reasons, including the potential impact of such actions at the international level.

The occupation government states that the goal of this project is to economically empower the residents of East Jerusalem, and provide them with the possibility of developing their lands, building on them, and taking official loans for this purpose. However, the actual danger lies in the fact that this project is enabling the Custodian of Absentee Property to scrutinize the ownership of Jerusalemite property in East Jerusalem, and seize control of endowments or properties that are considered absentee property or shares, according to the broad criteria in the aforementioned Custodian of Absentee Property Law⁵².

It is known that most of Jerusalemites have relatives in the West Bank or abroad. These are absent according to the law, which will make the properties in Jerusalem at risk of seizure by the occupation and the Guardian of the Absentees' Property, which violates the international law that prohibits the occupying authority from making any change in the legal and administrative status in the occupied territory. This cannot be prevented except through popular rejection of this project, and an official international position that prohibits the occupation from implementing it.

Not only has the Israeli occupation enacted racist laws that aim to confiscate and control land and property, but it has also enacted laws that interfere in people's private affairs and daily relations, and force them to abide by laws that contradict their religious laws. Including laws that give family affairs' courts or civil courts a jurisdiction parallel to the Sharia courts. Or laws aimed at limiting the powers of Sharia courts in the country. Sharia courts do not have exclusive jurisdiction in all waqf issues, as their role, unfortunately, has shrunk to an auditor role, and only related to the internal management of the waqf, as explained above.

The Israeli occupation has been in war with the Islamic waqf for many reasons, as we explained earlier, but this is mainly due to the fact that the property's ownership is immovable and that it maintains an Islamic character, generally in Jerusalem. Therefore, the occupation created other methods for charitable work for individuals in order to abandon and dilute the idea of the waqf, and to liberate property, particularly in Jerusalem, from any restriction with regards to the transfer of ownership. This is clear tampering with the property, people's rights and real estate registry, which entails the legal system to work on protecting it as part of protecting public order and applying the rule of law. However, what the occupation has done comes as part of its ambitions to Judaize the city and control its properties, even if this leads to a violation of the law and infringement of rights.

51 See Israeli Government Decision No. (3790) issued on May 13, 2018, published on the Israeli government website: https://www.gov.il/he/departments/policies/dec3790_2018

52 In this same sense, see: Eer Amim Foundation report, second report of 2021, published on 5/2021, p.1 and beyond





Among these laws is what calls for the idea of creating a “civil waqf”, devoid of the legal sense of a waqf, based on the Israeli Trust Law of 1979, which allows the establishment of a “civil endowment” that is not subject to Sharia provisions or Sharia courts. The law allows the civil judge, in some cases, to interfere with, and change the terms of the endowment⁵³.

This law facilitates the procedures required for the establishment of a civil waqf (compared to a legal waqf) by virtue of a written document only, in which the endower authorizes the establishment of the waqf, and defines its objectives, property and general conditions. This written document could be a legal document signed before a notary, or part of a written will by the endower. In fact, the law allows civil courts to consider a specific property as civil waqf even if there is no written document confirming its establishment, as long as this property is used in the service of a civil waqf. In this case, the court may determine the conditions and objectives of this waqf on its own. The law allows the endowed or those who are entitled to the endowment or the court, to change the terms of the endowment, and even to invalidate it and dispose of its property. The court may violate the conditions and objectives of the endower and allow the guardian to use the endowment property to serve the beneficiaries or their heirs.

The law also allows the transfer of the rights of the endowed, in favor of paying tax debts or alimony owed by the endowed.

Lastly, the court may change or invalidate any of the conditions of the civil waqf, even the entire waqf, based on the endower’s renouncement of it, or if the court considers that the circumstances have changed, or that the goals of the waqf have been achieved, or become unattainable⁵⁴.

Thus, it is clear that the civil waqf is not associated with the Sharia law, and its conditions are not required to comply with the provisions of Islamic Sharia, nor does it require registration before the Sharia court. But rather it takes away any authority it has over it, and makes the (central) civil court the in everything related to the civil waqf. It also allows a change in the conditions of the waqf and its use contrary to the objectives set by the endower. The most dangerous of all is that it allows the court or the beneficiaries the possibility of an absolute annulment of the waqf where they can dispose of it, thereby erasing the idea of perpetuation in the civil waqf.

While the definition of waqf, in general, has a religious character, and is linked to worship and closeness to God Almighty, and all monotheistic religions adopt the same definition, the “civil waqf” comes as a legal tool in the hands of the Israeli authority to strip the waqf of its religious character. This represents a radical change to the legal definition of the endowment that prevailed in Jerusalem and the Palestinian territories until then. Therefore, the judges of Sharia courts emphasize in the waqf deeds the registration of a special condition, according to which the waqf is subject to the provisions of Islamic Sharia only, without the civil provisions issued in the country, especially the Law of Trusts of 1979⁵⁵.

Since one of the goals of the rule of law is to protect property, and the rights of people in relation to it, we see that Israeli laws seek to serve the agenda of a racist policy that exploits the law to dispossess property rights, whether waqf or individual property, and transform them into Israeli properties through twisted “legal” ways. Including, also, the Israeli Associations Law of 1980, which allows the establishment of public social charitable works through public institutions such as associations, in accordance with the internal

53 See Articles 17 to 31 of the 1979 Israeli Trust Law.

54 For more details in this regard, see in Hebrew: Shlomo Karam, *Law of Trusts*, Fourth Edition 2004 CE, pp. 633 et seq. See also: Yeron Unger, *Trusts in Real Estate*, 2010, pp. 409 and beyond.

55 See, for example, the Family Waqf Deed Registration File No. 6324/2018 issued by the Jerusalem Sharia Court on 30/1/2019.

regulations established by these associations without being bound by the provisions of Sharia or Sharia courts, while the occupation provides various facilitations for these associations, including tax exemptions and others.

The property owned by these associations is free from any restrictions, so the association can sell or exchange it without any judicial permission or other. In some cases, the law imposes the transfer of this property to the ownership of the state in the event of the liquidation of these associations and the end or ban of their activity.

In this context, we mention the occupation's attempts to close the Bab al-Rahma prayer area on the pretext that it was the headquarters of the Heritage Committee's activities, which is considered a prohibited organization, and the closure of the place remained in effect for 13 years. Here, it is worth noting how the occupation exploited the legal powers granted to it by law, in order to control endowments and serve political agendas.

The Israeli Inheritance Law of 1965 is one of these laws that presents a civil alternative to the Islamic endowment system, as this law gives the person absolute freedom to make a will, so that the testator can dispose of his money as he pleases, and allocate it to the charity works he wants. For example, it is permissible by this law for So-and-so to grant a specific plot of land to a hospital or another. However, this will differs from the waqf in that it transfers the property to the bequest without any restrictions, and they can sell it and dispose of it as they please, which contradicts the idea of the waqf in terms of preventing actions that transfer its ownership.

We note here that Jerusalemites were aware of the goals and objectives of the occupation, and succeeded in thwarting the plans, which the occupation sought through these laws. Many charitable societies in Jerusalem have endowed their property as Islamic waqf before the Sharia courts, and thus these associations have proven the sanctity of the eternal Islamic character of these properties.





CONCLUSION AND RECOMMENDATIONS


The Islamic endowments' system allows for the preservation of property in Jerusalem and keeping it in the hands of its original inhabitants, and withholds the ownership of these properties from the actions that aim to transfer their ownership. The system preserves these properties and keeps them in the hands of their owners, the original inhabitants of the land, and prevents their diversion to others.

A period of solid legal regulation of Islamic waqf affairs prevailed until the end of the Ottoman rule in the country, which increased the number of waqf properties in the city.

The goal of the Israeli occupation, since its inception, has been to control waqf properties. This has been evident through its interference in the affairs of Islamic endowments in general, through imposed laws that attempt to compromise the sanctity of Islamic waqf, and undermine the legal value of their supporting deeds. The occupation also aims to alienate people from the waqf culture, and propagate discord among them, especially since the solutions reached through these imposed occupation laws or through civil courts, are unjust and do not treat individuals fairly, and are not commensurate with the Islamic waqf system.

In light of the above, we suggest the following:

1. Activating the Jordanian guardianship over the affairs of Islamic endowments in a meaningful way, and activating all departments affiliated with the Ministry of Endowments, in particular creating a department associated with the development of waqf funds in Jerusalem, in accordance with the requirements of the Jordanian Law of Endowments, Islamic Affairs and Holy Sanctities.
2. Launching projects to protect Islamic waqf, through the Jordanian Ministry of Endowments, and civil society institutions, especially the Islamic cemeteries in Jerusalem; al-Rahma Cemetery, Yusufiya, and the Unknown Soldier cemeteries.
3. Undertaking an awareness-raising campaign to educate people about the legal aspect of owning a waqf, its transactions, importance and the way it is managed, in order to correct the misconceptions that the occupation planted in the minds of the community, and to encourage individuals to endow all properties in Jerusalem.
4. Spreading legal awareness among people, and mobilizing public support for the need to resort to God's law and waqf laws in matters relating to waqf, and not abide by Israeli laws- that aim to maintain chaos and instability in financial transactions between individuals and families, especially Israeli laws that regulate the issue of selling the benefit-. As well as to emphasize the exclusive jurisdiction of the Sharia courts in waqf issues, by agreeing to the authority of the Sharia courts in these issues, or by including the arbitration clause in the Sharia courts in all waqf issues and its transactions among community members.
5. Establishing a general framework and a national charter that regulates the relationship between the endowments' guardians and their beneficiaries, in order to strengthen cooperation between them and the Sharia courts, the Endowments Department, and relevant bodies.
6. Establishing a legal defense institution that provides free legal representation and defense for family endowments whose yield is not sufficient to appoint specialized lawyers or consultants, because the above described reality indicates that the rights in many family endowments have been undermined and lost due to the lack of sufficient financial liquidity to appoint attorneys to waqf cases.

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7. Establishing a special and independent register to document endowment properties in Jerusalem, taking into account the following:
- This record shall be organized in the same way as in the Tabo records, in which lands and real estate are divided into basins and plots. Waqf properties shall be inventoried, their boundaries and area documented, and maps prepared in order to include entries in the register. This also includes settling the rights to these lands and adjudicating all relevant claims.
 - Documenting all transactions that take place with relation to waqf properties, and any changes that occur within its limits, and that these records shall be updated constantly and permanently according to changes and transactions.
 - Reviewing all old lease contracts and following up on the status of property held by different parties to arrange and establish ownership and waqf rights therein.
 - The Awqaf Department reviews its legal and judicial work mechanisms in dealing with endowment disputes, and focuses on alternative means to resolve disputes
 - Activating international law:
 - There is an urgent need to activate international humanitarian law in order to protect property rights and endowments, as they are one of the rights that the law seeks to preserve.
 - Activating international criminal law in relation to human rights violations committed by the occupying authorities, especially after the decision of the International Criminal Court on 5/2/2021, which confirmed the competence of the International Criminal Court in The Hague in terms of human rights violations in the occupied territories, which the resolution defined as the West Bank, including East Jerusalem and Gaza Strip.
 - Resorting to international human rights institutions to expose the Israeli manipulation of the land registry, and to employ the laws in order to control endowment properties.





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- The Family Violence Prevention Act of 1991.
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Legal status of Christian Endowments

Prepared by: Ahmed Hunaiti

INTRODUCTION

The Islamic and Christian endowments in Palestine, and Jerusalem in particular, are issues related to religious, political and societal heritage with overlapping multiple dimensions. This specificity stems from the status of Jerusalem in the religious belief and its adherents, Muslims and Christians, as well as its centrality in the Palestinian cause on the one hand, and in the Israeli settlement strategy and its associated policies of Judaization and Israelization on the other hand, in addition to its status in international law.

Israel - as the occupying power - has repeatedly sought to control the property of Islamic and Christian endowments in Jerusalem, through numerous tortuous ways and means. It was able to achieve some of its goals through various tools and mechanisms, such as confiscation and erasure/demolition of religious property and the establishment of Israeli institutions in their place, as will be discussed later. In addition to the “usurpation deals”^{*} of some Christian waqf properties in Palestine to Israelis, most commonly through long-term sale or lease.

Perhaps the usurpation of some properties belonging to the Greek Orthodox Church is the most complex⁵⁶ of all. Jerusalem has representative bodies of all Christian denominations in the world. The Orthodox Church is the largest and most widespread, making up 51% of Palestinian Christians. The properties of Christian denominations constitute 45% of the area of the Old City of Jerusalem. The Orthodox Church, alone, owns 18% of the area of the western part of Jerusalem, and nearly 17% of the area of the eastern part⁵⁷, bearing in mind that the supreme authority in the Church is not Palestinian.

It is worth noting that the referral authority for both Islamic and Christian endowments in Jerusalem is the “Hashemite guardianship” of the Hashemite Kingdom of Jordan. The Jordanian government excluded the Islamic and Christian endowments in Jerusalem from its “administrative and legal disengagement” from the West Bank in 1988, provided that the responsibility of these sanctities is moved to the Palestinian custody after sovereignty over Jerusalem is transferred to the Palestinians⁵⁸, as stated in Clause “D” of the introduction to the renewed agreement on March 31, 2013: based on the role of the Sharif King Hussein bin Ali in protecting, caring and constructing the holy places in Jerusalem since 1924, and the continuation of this role through the King of the Hashemite Kingdom of Jordan, descendent from the dynasty of Sharif Hussein bin Ali until today, and based upon the pledge of allegiance according to which the guardianship of the holy places was settled to Sharif Hussein bin Ali, whose pledge of allegiance was confirmed on March 11, 1924, by the people of Jerusalem and Palestine. No. 27 of 1958⁵⁹.

56 There is a wide variety of literature on the confiscation of Christian endowments or the transfer of these properties to the Israeli occupation government, see for example:

Elif Sabbagh. “The National Orthodox Issue”, Israeli Issues Journal, No. 61.

Hind Ghassan Abul Shaar. Islamic and Christian Endowments in Jerusalem: (2) Historical Dimensions, Documentation Sources and the Threatened Jerusalem Heritage, Jordan: Arab Thought Forum, 2014.

Ibrahim Abdel Karim. Zionist Encroachments on Islamic and Christian Endowments and Sanctities in Palestine 1948-2011, Kuwait: The General Secretariat of Endowments, 2012.

57 Fadi Shamiya. “Christian Properties and Endowments in Jerusalem”, in: Editing by Mohsen Saleh, Studies in the Cultural Heritage of the City of Jerusalem, Beirut: Al-Zaytouna Center for Studies and Consultations, 2010, p. 247.

58 Previous source, p. 257.

59 Journal of Palestine Studies. The text of the agreement signed by King Abdullah II and President Mahmoud Abbas, which affirms that the King is the guardian of the holy places in Jerusalem, Vol. 24, p. 95, (Summer 2012).



The Jordanian law has granted Christian denominations a large degree of independence in establishing courts to look into internal cases related to Christian denominations. Article (2) of the Christian Denomination Councils Law No. (28) of 2014, states: the Christian denominations in the Kingdom, which are listed in the table attached to this law, may establish courts called (Councils of Christian Denominations) to assume the authority to consider cases within their jurisdiction⁶⁰. Among the powers entrusted to these councils are endowment issues. The so-called “ecclesiastical courts”; which have the competence to decide disputes related to issues within the jurisdiction of the Church, are usually identified and organized according to the “ecclesiastical law”. Each church has ecclesiastical traditions, and the competent ecclesiastical authorities codify and regulate these traditions. These courts are only binding on believers who belong to that church⁶¹. Thus, these traditions-laws differ from church to church.

That’s why, some countries granted legal autonomy to some religious minorities in the country to organize the affairs of their communities, as is the case for the autonomy granted to Christian denominations in Palestine and Jordan. According to Fadi Abbas and Rasha Salah al-Din, the jurisdiction and legal or authoritarian powers of some churches, exceed the political borders of the state. Sometimes the jurisdiction of ecclesiastical courts extends to Jerusalem and the occupied Palestinian territories, the West Bank, Jordan, Syria and Lebanon, and some of them even to Cyprus. This calls for the presence of more than one court of first instance, and in some cases more than one court of appeal, to cover the different areas of jurisdiction of the churches. For example, the Latin community in the Occupied Palestinian Territories, including East Jerusalem, have courts of first instance in Jerusalem and Nazareth (headed by the same deputy judge); and in Amman-Jordan (headed by a second deputy). The Court of Appeal is located in Jerusalem and Amman only and is headed by the same judge. The Roman Catholic Patriarchate is also located in Syria, with a Patriarchal Exarchate for the occupied Palestinian territories in Jerusalem. However, members of this church litigate before the Latin Court of First Instance in Jerusalem, as in the case of other Eastern Catholic denominations.

As for the Evangelical Lutheran Church in Jordan and the Holy Land (ELCJHL), the Denominations Councils Law stipulates that the Arab Evangelical Court shall have two courts of first instance in Jerusalem and Amman, and an appeals court in Jerusalem or anywhere else, according to the needs of the personal status law of the Arab Evangelical Episcopal Council (1954)⁶². An order was also issued by the Vatican to prevent the sale of any Christian property, even if it was not a church endowment, without prior permission from the Vatican. This permission is impossible to obtain without the approval of the Church of Jerusalem⁶³, which means that the hierarchy of ecclesiastical authorities and their supreme legal and legislative authority reach beyond the borders of the political state.

This paper tackles the legal status of Christian endowments in Jerusalem, and bases its treatment of the legal status on three documents: Law No. (27) of the Jerusalem Orthodox Patriarchate Law⁶⁴ (1958), the Personal Status Law of Catholic denominations⁶⁵, and the Personal Status Law of the Arab Episcopal Evangelical Community⁶⁶.

60 Christian Denominations Councils Law - Jordan Legislation (jordanianlaw.com)

61 Researchers. Sharia and Ecclesiastical Judiciary in Palestine, Birzeit: Institute of Law at Birzeit University: December 2012, pp. 4-5.

62 . Fadi Abbas & Rasha Salah Eddin. Women’s participation within Religious Courts in the Palestine, and the Importance of their Participation as Decision makers. (November 2021).

63 Bishop Maroun El-Lahham. “Catholic Christian Endowments in Jerusalem’: Hind Ghassan Abu al-Shaar (Editor), Islamic and Christian Endowments in Jerusalem: (2) Historical Dimensions, Documentation Sources and the Threatened Jerusalem Heritage, aforementioned source, p. 254

64 Legislation and Opinion Bureau, Jordanian Legislation System - Greek Orthodox Patriarchate - News website (jerusalem-patriarchate.info)

65 Personal Status Law for Catholic Denominations (birzeit.edu). This law is concerned with the following Catholic Christian denominations: the Maronites, royal Roman Catholics, Armenian Catholics, Syriac Catholics, Latins, and Chaldeans. يختص هذا القانون بالطوائف المسيحية الكاثوليكية الآتية: الطائفة المارونية، طائفة الروم الكاثوليك الملكية، الطائفة الأرمنية الكاثوليكية، الطائفة السريانية الكاثوليكية، الطائفة اللاتينية، الطائفة الكلدانية.

66 muqtafi2.birzeit.edu/muqtafi2/transform/fulltext/JTJGZIIImkZtdXF0YWZpJTJGYWN0JTJGeG1sJTJGMTk1NCUyR





GENERAL FRAMEWORK

The general framework regulating Christian endowments is the same as the basic framework that regulates endowments in general, regardless of its religious authorities. The basic rules of endowments are fixed, cross-denominational, and interreligious, especially with regard to the components, conditions and types of endowments. In terms of defining the endowment, it has an exhaustive definition, which is “the removal of the endowment’s ownership from the endowed so that the wealth from the endowed property can be spent in the way of God Almighty”.⁶⁷ Specified by the waqif in the waqf formula provided that these conditions do not conflict with religious doctrines or with the law. The process of losing ownership of the endowment means the endowment is no longer under the control of the endower in terms of selling, giving and disposing of it, but that it is subject to the conditions set by the endower in the endowment’s contract, provided that these conditions do not conflict with religious doctrines or with the law.

There are also two types of endowment (waqf); the first is charitable and means allocating the waqf’s benefits to a charitable body directly, such as mosques, treating the sick, and so on. The second is the family waqf, and means allocating the benefits of the waqf to the offspring of the endower or specific persons, and in the event of the death of the endower, it becomes a charitable waqf⁶⁸. Proof of ownership (proving the endower’s ownership of the endowed property) is a basic condition, and one of the important issues in the legal procedures for registering the waqf.

The previous legal background forms the basis of the waqf for all religious denominations in Jerusalem, and from which these denominations derive their waqf laws. For example, a distinction is made between the general definition of waqf, which includes all property belonging to the religious institution, whether by ownership or supervision, and the specific definition of waqf, which is “withholding ownership.” In the Catholic denominations’ law, two definitions of waqf are included, the first includes its broad sense, and the second includes its exclusive sense. In Article (255) of the Personal Status Law for Catholic denominations, the word waqf, in its broadest sense, is used to refer to all charitable institutions and temporal funds that are owned by the church, and the legal persons affiliated with it, whether material (fixed, movable), or immaterial (benefits, financial rights, and the like). As for its exclusive meaning, the waqf means preventing the ownership of a property by any person, and giving its wealth to charity.

In the Personal Status Law of the Arab Evangelical Episcopal Denomination, waqf is defined in Article No. (7) as follows: a legal waqf means withholding its possession by anyone, and disposing of it for the benefit of a certain group, or the poor, or any charitable cause. The endowment is held once the word waqf is uttered by the family, fulfilling the conditions of validity, and by the will of the testator before his death, or by a special contract organized in the presence of at least two witnesses signed by the endower and the two or more witnesses, and ratified and agreed upon. Other denominations share the same definition of the waqf, to a large extent, which is consistent with the definition in the framework governing the waqf process as a whole.

m5hX1RCRF85OTg4LTA5LTA5X2FyJTJGTMU2NTBfMTk1NC54bWw#:~:text=محاكم الطائفةالأحوال, قانون الأحوال, تعني لفظة "قانون" قانون
67 Anis Qassem. “The Legal Status of Endowments and Their Role in Jerusalem”: Nadia Saad El-Din (Editor), Islamic and Christian Endowments in Jerusalem: (1) Legal and Humanitarian Dimensions and the Future of Jerusalem, Jordan: Arab Thought Forum, 2014, pg. 53.

68 Previous source, pg.54



Usually a distinction is made between two basic types of waqf; charitable waqf and family waqf. Charitable waqf relate to endowments that benefit the public, whether for worship purposes or temporal services such as education, health, aiding the poor, etc. As for family waqf, or what the endower endows to his family, some literature has added joint endowments, which are part charitable and part familial, but this does not negate the fact that there are only two basic types of waqf, namely charitable and family waqf. In the endowments of some Christian denominations, a distinction is made between three types of waqf: religious, charitable and family waqf. In the personal status law of the Catholic denominations, the law identifies these three types as follows: a. a religious waqf is an endowment whose benefit has been dedicated since its inception for worshipping God and helping the servants of the church, or performing any other religious work. B. A charitable waqf is endowed to charitable causes since its establishment, such as hospitals, shelters and schools, and aiding the poor in particular. c. Family waqf, is endowed to the endower himself and his offspring or others whom he chose to benefit, provided that its funds is transferred to serve religious and charitable causes after the death of the beneficiaries.

Endowment laws in Christian denominations also agree on the need to adhere to the conditions of the endower in a manner that does not lead to legal or religious violations. For this reason, the laws emphasize the importance of applying the conditions contained in the endowment deed, while the denominations agree on the prohibition of selling endowments except within specific conditions. The most important of which is obtaining decisions from the civil or ecclesiastical courts regarding these sales, according to the mechanism in which the endowment is organized (ecclesiastical or civil), and this applies to cases of substitution and the like. Another waqf should be bought to replace it in accordance with the conditions of the previous waqf. Sometimes, a confusion may occur with regards to two types of property supervised by the church: the first is the church's own property, and the second is the property which the church supervises its management. The latter is waqf property, which the church usually disposes of through lease contracts that can sometimes be long-term. The church can dispose of the money of the first type in the way it sees fit, and this will be addressed in detail later.

Some denominations have subjected family waqf to the general supervision of the church through the general custodian of endowment properties, in order to ensure integrity and transparency in the fulfillment of its conditions. Some denominations did not address family endowments in their laws, perhaps this is due to the consideration that their revenues will continue to be spent on the endower's offspring, as the endower of these properties is often a family member. In the event of any violations or objections to how the family endowments are managed and their revenues are distributed to its beneficiaries, the beneficiaries can resort to the ecclesiastical or civil courts to correct the problem.

ENDOWMENT MANAGEMENT

The management of endowments differs from one denomination to another, but, in general, it can be said that this difference is not completely essential, as it does not constitute an effect or a change in the foundation upon which the endowment is based. This part tackles the management of endowments in three Christian denominations, namely the Greek Orthodox, Catholics and Evangelicals, with the Greek Orthodox Church being the most complex in its management of endowments.

There is a historical conflict within the Orthodox Church, related to the representation of Arab clergy within the church's administrative body; or what is known as the Brotherhood of the Holy Sepulcher. That's why the Palestinian members of this denomination call these





differences the national Orthodox issue⁶⁹. Most of the political authorities that ruled Palestine worked to keep the Arab clergy from running the church that includes the Ottomans, the British Mandate, and the Israeli occupation authorities. In many cases, successive Jordanian governments worked on upholding this “policy” to “remove Arab clerics from managing church affairs”.

These policies had a significant impact on the status of the Orthodox endowments in Jerusalem, as “the text of the Constitution of the Brotherhood of the Holy Sepulcher, with its thirteen articles, does not contain any spiritual or doctrinal content, but rather arrangements for material control over the assets of the Jerusalem Patriarchate”.⁷⁰ Al-Sabbagh added, “Disputes continued between the representatives of the Arab community and the patriarch for years, and the issue of endowments and their revenue was at the heart of all disputes. The Greek Patriarch and the Greek Brotherhood of the Holy Sepulcher considered the endowments as property that to belong to the Greek nation, while the national representatives of the community believed that the endowment revenues should benefit the needy children of the Church”⁷¹.

Bassem Farraj states that the Greek Patriarch, through the Brotherhood of the Holy Sepulcher, seized the church’s property and endowments, and that the church seeks to Greek-ize the sacred Arab-Christian historical heritage and consider it a Greek property, as the Greek patriarchs control the waqf’s incomes and proceeds⁷². As a result of the protests by the patriotic Arab members of the denomination, the Basic Law of the Turkish Revolution was enacted on July 11, 1908, of which Article 111 stipulates: a council shall be elected for each denomination in each district, whose members are elected from the said denomination. Among its powers is to look into the incomes of endowed property and money, in order to spend them according to the conditions of their endowers, taking into consideration those who have a right to it and the charitable causes it may serve⁷³. An Ottoman decree was issued on 25 May 1910, followed by the recognition of the distinct rights of the Greek clergy. An order was issued to establish the mixed council as stipulated in the law of 1875, and to have the Patriarchate allocate a third of its revenues (not less than 30,000 Ottoman liras), to be spent on education, health and helping the poor. The government order also demanded that the mixed council monitor the election of local trustees to manage the Patriarchate’s public endowments, which were the properties endowed for the benefit of the needy members of the community in the cities and villages affiliated with the Patriarchate⁷⁴.

As for the laws regulating the work of the Patriarchate, based on the Jordanian legislation in the Greek Orthodox Patriarchate of Jerusalem Law (Law No. (27) of 1958), the law gives the Patriarch supreme powers that enable him to form the community council according to his interests, and gives him great powers in how to manage the Patriarchate and its property. According to Article (5), the Patriarch assumes the responsibility for: administering all matters related to the spiritual goals of the Orthodox shrines, churches and monasteries of the Patriarchate, determining the status of the positions of Orthodox clergymen affiliated with the Patriarchate and the service of those appointed and attached to it, and the spiritual duties of the clergy and the aforementioned service. This in addition to administering all Orthodox religious endowments, seminaries, hospitals and charitable institutes directly affiliated with the Patriarch in the Synod, as well as managing all properties directly affiliated with the Patriarch in the Synod and disposing of them in accordance with the provisions of the law, and the conditions of any relevant endowment.

69 On the differences within the Orthodox Church over the representation of the Palestinian clergy, see: Sabbagh, a previously mentioned source, No. 61

70 Previous source, p. 63

71 The same source, p. 65.

72 Bassem Farraj, “A Brief History of the Endowments of the Orthodox Church (Mother of the Churches) in Jerusalem”, in: Hind Ghassan Abu Al Shaar (Editor), *Islamic and Christian Endowments in Jerusalem: (2) Historical Dimensions, Documentation Sources and the Threatened Jerusalem Heritage*, (Jordan: Forum for Thought Al-Arabi, 2014), p. 248.

73 Sabbagh, a previously mentioned source, pg. 64.

74 Same source, p65



With regard to endowments, Article (11) grants the Patriarch great powers to manage endowments. The article includes: management and disposal of all properties directly affiliated with the Patriarch in the council, in accordance with the provisions of the law and the conditions of any relevant endowment. Article 12 states: the Patriarch in the council shall be given a legal personality status that has the authority to own movable and immovable property, receive inheritance and endowments, and dispose of them for any purpose related to the Patriarch's powers or duties in the council, since he holds the status of a "guardian", in addition to the authority to prosecute and defend his name before the courts, and carry out any work required by His powers and duties. Article 32 states: all movable and immovable property, of whatever type, belonging to the Patriarchate is entrusted to the Patriarch, and registered in the name of the Greek Orthodox Patriarchate of Jerusalem. This is unfair to the Palestinian community, especially since many endowments were devoted to spending on local monasteries and churches. As Faraj states, "It is noted from the endowment conditions that each denomination, especially the Greek Orthodox, endowed its family and charitable waqf for the benefit of its children and monasteries. It is clear from the endowments deeds of holy places, that they were not limited to the wealthy Christians, but also included the middle class. Hence, it was noted that many endowment deeds includes small property or part of a property.⁷⁵" That's why the Palestinian members of the community call for the importance of monitoring the supervision of endowments and the various church properties to preserve them and prevent their diversion to the Israelis⁷⁶.

According to the Personal Status Law of the Catholic denominations, Article (266): the waqf must be registered in the records of the ecclesiastical court rulings, and in the patriarchal or diocesan register, or through the person designated for the waqf, and in the records of the competent government departments that are responsible for carrying out the legal procedures related to the removal of property and its transfer within real estate records. There is a hierarchy concerning the supervision and management of the waqf, and it goes beyond the borders of the Jordanian state. Article (269) states: 1. The supreme public guardian of waqf in the entire church is the Roman Pontiff. 2. The Patriarch of each denomination is the general guardian of his denomination's endowments and ecclesiastical funds throughout the Patriarchate. 3. The bishop or local ecclesiastical head is also the general guardian of his denomination's endowments and ecclesiastical funds within the boundaries of his diocese or the place of his jurisdiction. 4. The general head of the order is the general guardian over the endowments of his order, its properties, monasteries and funds. 5. The guardians-general shall exercise their powers in accordance with the provisions of the ecclesiastical laws mentioned in Article 256. The general guardian manages the endowment, in accordance with Article (270), either directly by himself, or through an agent or private guardian. The agent or special guardian of the Catholic endowments must be an adult Catholic, honest, intelligent, of good conduct and an expert in managing temporal funds. These attributes in the guardian or the endowment overseer constitute the most important responsibilities of the endowment administrator in general.

The ecclesiastical laws have allowed the ednower to have an important role in managing the affairs of the waqf, by appointing whomever he deems fit to do the job. In the personal status law for Catholic denominations, Article (271) states: 1. The endower, as long as he is alive, has the special authority over his waqf, unless he denies it on his own in the endowment deed, or voluntarily abandons it later, or becomes unfit for it. 2. The ednower may also appoint a special guardian to manage his waqf, whether during his life or after his death, provided that he is qualified to do so in accordance with Article 270, paragraph 2. 3. The special authority shall not be removed from the endower or whomever he appoints as special guardian of his endowment, except by a decision by the competent court.

75 Farraj, a previously mentioned source, p. 250

76 Farraj, a previously mentioned source, p. 250





In cases where the endower does not appoint a guardian or overseer of his endowment, the general guardian assumes the tasks of assigning whomever he deems appropriate. Article (272) of the Personal Status Law for Catholic denominations states: if the endower does not appoint a special guardian to his waqf, the right to appoint him reverts to the immediate general guardian, and he must do so as soon as possible. If a month passes without an appointment, the head general guardian must take his place in naming the special guardian. Article (273) elaborates: the general guardian has the right to appoint one or more overseers to the private guardian, and he has the right to impose financial guarantees on this special guardian, whether he was the one who appointed him or the endower, before handing him the administration of the waqf, if he deems these guarantees necessary. The law also ensures, in accordance with Article (276), that the general guardian supervises the endowment accounts periodically, as the same article states: the special guardian must process accounts to the general guardian every year, and whenever he is requested to do so. The guardian-general may check these accounts, follow up on the fund, and inspect the properties, documents and names. He may do so suddenly, by himself, or through a representative.

As for the Arab Evangelical Episcopal Church, Article (151) defines the authority of pastoral mayors in relation to managing waqf, that fall within their jurisdiction in the following form: waqf properties that are endowed for the benefit of a certain Arab Episcopal Evangelical pastoral mayor, church, charitable institutions or affiliates, a pastoral mayor or specific Arab episcopal evangelical pastoral mayors. Properties that are under no requirement to be managed by the Arab Episcopal Evangelical Synod. Endowments endowed for the benefit of a needy group under a specific pastoral mayor\’s or a specific Arab evangelical episcopal individual (if it is stipulated in its contract that its management be entrusted to a certain pastoral mayor\’s of the Arab Evangelical Episcopal denomination). Endowments that are withheld for the benefit of a needy Evangelical family, that are under no requirement to be under the administration of the Arab Evangelical Episcopal Synod.

CONDITIONS AND RESTRICTIONS FOR “SALE OR EXCHANGE” OF THE ENDOWMENT

The Christian denominations organized the process of disposing of the endowment in terms of exchange, sale or transfer. All these issues exceeded the terms of reference of the powers of the direct guardian of the endowments, and subjected them to the “general guardian,” or to the decision of an ecclesiastical or civil court. In the personal status law of the Catholic denominations, Article (278) states: A special guardian may not sell, mortgage, or exchange any valuable immovable or movable endowment property, nor owe the endowment money or borrow money without a legitimate justification, or authorization of the general guardian- in accordance with the provisions of laws: 65, 68, 279, 283, 288, 290, 291 of the Apostolic Will “On Monks and Church Temporal Funds”.

Article (279) limits the authority of the special guardian in administering the endowment to what is customary, and states: 1. every action carried out by the special guardian, without written permission, and outside the limits and method of normal management, and in contravention of Article 274, is considered void. 2. Every contract that he makes without a written authorization, the Church will not bound by it, except to the extent that serves the good and interest of the endowment. Article (281) addresses all unusual forms of disposal of endowment: the endowment is replaced by barter or sale, taking into account its interests and the interests of the endowed body. Article 283 stipulates that the endowment is transferred in the following cases: a. If the endower stipulates that for himself in the



endowment deed. B. If its purpose or intent is no longer valid. c. If its revenues exceed the needs of the guardian, then the surplus can be transferred. The same article also adds that in the cases specified in the previous paragraph, the transfer procedures are carried out by a court decision based on the request of the endower or the attorney for justice.

According to the Arab Evangelical Episcopal Church, Article (268) stipulates: A special guardian may not sell, mortgage, or exchange anything of the endowment's fixed property, nor can he owe the endowment money or borrow an amount without a legitimate justification and the authorization of the general guardian. Concerning the endowment barter, the article adds: the endowment is exchanged by barter with sale, taking into account the interests of the endowed party. Article (272) added that the replaced asset: 1. The asset replaced by the endowment becomes an endowment with conditions, without the need to renew the endowment or issue a new certification. 2. Likewise, the funds obtained from the sale of the endowed asset, with legitimate justifications for its exchange, shall not be owned by the endower and are not spent on the endowed party. Rather, he shall use them to buy an asset that, once purchased, is considered a waqf bound by the conditions of the first waqf. 3. If the endowed entity has another endowment that needs necessary construction, it is permissible to spend that money on its construction with the permission of the general guardian, provided that it is collected after that from its revenue to purchase the necessary replacement. As for the transfer of the endowment, Article 273 states: 1. the transfer of the endowment shall take place in the following cases: a. If the endower stipulates that for himself in the endowment deed. B. If its purpose or intent is no longer valid. c. If its proceeds exceed the needs of the guardian, then the surplus can be transferred. 2. In the cases specified in the previous clause, the transfer shall take place by a court decision based on the request of the endower or the attorney for justice.

The process of disposing of waqf property (replacement, barter, sale), is subject to complex procedures, and respects the conditions of the waqf, and takes into account the interest of its property. This is basically done in the event that the waqf does not achieve the goal or benefit for which it was endowed. A replacement of the sold waqf is purchased, and is considered a waqf under the terms of the sold waqf, and for this reason the disposal of waqf property is subject to higher conditions, procedures and decisions in the ecclesiastical authority.

A distinction can be made between two types of church property. The first is the property obtained by the church through purchase or gifts, and sometimes the clergy in the church may own them. The second type is waqf, meaning "tied up property"; as they are held by specific persons by their own money, and are subject to the procedures and conditions of the waqf. These two types of church property usually cause a great deal of confusion and indistinguishability. In the first type of church property, the church has the right to dispose of its property, by selling, buying, exchanging, and so on, but in principle, these behaviors must take into account the interest of the church. While the second type is the one, in which the church disposes of leases, that could be long-term, such as a hundred years or more. The long-term lease contracts can appear as sales, which creates confusion when deals for usurping waqf lands are announced or revealed. For example, some major Israeli institutions that were established on Christian waqf lands have long-term lease contracts. The Israeli Knesset was established on land that was leased in 1952, for a period of 99 years, and the lease contract stipulated that the contract would be automatically renewed. The Land of Israel Fund is trying to lease it for 999 years. The Ansari land was leased for 250 years in order to establish biblical gardens. The last "usurpation", which caused major protests, had to do with the Jaffa Gate area in 2005, where the literature states that the Greek Orthodox Church leased the Imperial Hotel, the Petra Hotel and 27 shops, all of which are located in Jaffa Gate, for a period of 198 years⁷⁷.

77 Shamiya, a previously mentioned source, pp. 256-257.





At the same time, the Israeli occupation authorities, and sometimes through the occupation municipality in Jerusalem, confiscated some property and waqf lands belonging to churches in Jerusalem. For example, in 2000, the Israeli occupation municipality demolished the Church of the Ascension on the Mount of Olives on the grounds that it was built without a permit/license⁷⁸. In 2008, the occupation municipality seized a plot of land owned by the Greek Orthodox Patriarchate in Wadi Hilweh, Silwan, nearby the Aqsa Mosque, and turned it into a parking lot, using the “temporary disposal” law⁷⁹. In 2009, the Israeli occupation municipality issued a decision to demolish buildings belonging to the Armenian Catholic Patriarchate in the Old City, located on the Via Dolorosa⁸⁰, in addition to other confiscations and demolitions, such as confiscating the land on which Hadassah Hospital was built in Ein Kerem, and another land located between the King David Hotel and the railway station. As well as the confiscation and demolition of the “Fast Hotel” building, the demolition of the Church of St. Pelagia on the Mount of Olives, and the bulldozing of a cemetery in the Church of the Virgin Mary in Gethsemane⁸¹.

CONCLUSION

The general framework of endowments is considered the “reference” for legal Christian denominations in most of their transactions, and this matter constitutes the essence of the content of their own laws related to endowments. The sequence of special endowment laws for each denomination determines the administrative and legal powers of each denomination, in line with its legislative and legal hierarchy. In other words, the endowment laws for each denomination rely on the hierarchy of powers based on the religious status of the church and its clergy, and often these legal powers go beyond the limits of the political state in Palestine and Jordan.

Endowments, both Christian and Islamic, enjoy international protection as they are part of the heritage, and sanctities that must be protected and preserved. The United Nations General Assembly Resolution No. 181, issued on November 29, 1947, on the Partition of Palestine, stated that the “Family and Personal Status Law must be respected for various minorities and their religious interests, including endowments”⁸². Article 46 of the Fourth Hague Convention stipulates that “Private property cannot be confiscated,” and Article 56 stipulates that “the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.”⁸³. Especially since the Israeli authority is an occupying authority in Jerusalem whose sovereignty over the Old City of Jerusalem is not recognized by international law, nor is it a mandate authority under an international resolution⁸⁴, and therefore any Israeli policies or actions towards endowments are considered an act of aggression according to international law.

The Israeli occupation is violating international laws with its Israelization and Judaization policies in the Holy City, using methods of pressure, threats, and blackmailing against the Christian clergy to cooperate with the occupation government, in “facilitating the diversion” of Christian endowments and churches’ properties to the Israeli occupation government. The security establishment of the Israeli occupation worked on interfering in the procedures for appointing some patriarchs, although this is not within its authority; as it is

78 Lahham- a previously mentioned source, p. 258

79 Shamiya, a previously mentioned source, p. 262.

80 Previous source, p. 264

81 Ibrahim Abdel Karim. *Zionist Attacks on Islamic and Christian Endowments and Sanctuaries in Jerusalem (1948-2011)*, aforementioned source, pp. 282-286

82 Qasim, a previously mentioned source, p. 56

83 Previous source, p. 58

84 Sabbagh, previous reference, p. 74



the occupying power in East Jerusalem. Mo'in Khoury says: "The Patriarch or the religious presidency needs recognition from the Israeli leadership, which is often subject to conditions that include concessions or silence regarding the aggression of the occupation or non-interference in national issues, or taking principled positions. These "deals" have become blatant in the last four years after a period of being carried out behind closed doors"⁸⁵. The Israeli political level often intervenes to push for the appointment of patriarchs who do not have positions against Israel, and this intervention may be at the level of the prime minister, and some other Israeli parties. The Israeli recognition is not a necessary condition for acknowledging the appointment; it is an "urgent" need for the patriarchs to facilitate the exercise of their religious and administrative powers in Jerusalem. Some Israeli authorities have managed, through illegal means, to "usurp" some church properties, or rent them for very long periods, especially properties owned by the Orthodox Church.

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85 Mo'in Khoury. "The Legal Status of Christian Endowments in Jerusalem": Nadia Saad El-Din (Editor), *Islamic and Christian Endowments in Jerusalem: (1) Legal and Humanitarian Dimensions and the Future of Jerusalem*, Jordan: Arab Thought Forum, 2014, p. 83.









Heritage Protection in East Jerusalem under International Law⁸⁶

Prepared by: PASSIA

INTRODUCTION

Since its occupation in 1967, and increasingly in recent years, East Jerusalem has witnessed countless incidents of civil and state-backed destructive actions directed against and undertaken within its holy places and sites of cultural heritage, including the Al-Aqsa Mosque compound/Haram Ash-Sharif and the Church of the Holy Sepulcher.⁸⁷ The Al-Aqsa Mosque compound has seen numerous violations of its integrity, including regular access restrictions, Israeli soldiers storming its courtyard, soldiers firing into its mosque and wounding countless worshippers and armed settlers violently gaining access to it.⁸⁸ The Church of the Holy Sepulcher has also come under an increased threat of having its status quo violated, as Israeli organizations use police forces to impede access,⁸⁹ and the Israeli government has historically suggested it need not comply with its status quo in general.⁹⁰ Apart from those two prominent sites, a large number of other religious or cultural locations within the Old City and East Jerusalem have faced increasing interference and desecration by the Israeli state and Israeli occupation municipality in Jerusalem since 1967. Sites are subject to unnecessarily cumbersome administrative regulations, high taxation, risk of collapse due to nearby construction activities, and the threat of property destruction and loss due to increased facilitation of confiscation by Israeli authorities.⁹¹ The numerous Israeli archaeological excavations do not only interfere with cultural heritage, but also endanger the stability of buildings and structures situated above the excavated area.⁹² Moreover, countless Palestinian antique artifacts and Islamic pieces of art, confiscated during the 1967 War, are displayed in Israeli museums.⁹³

None of these acts against religious and heritage sites or of cultural appropriation have

86 This chapter was first published as a Bulletin by PASSIA under the title Heritage Protection in East Jerusalem under International Law in April 2022.

87 The concept of heritage can be defined as “features belonging to the culture of a particular society, such as traditions, languages, or buildings, that were created in the past and still have historical importance” (Cambridge dictionary). It includes a vast number of elements, tangible and intangible, and it is an important feature of the ethno-cultural and religious identity of a people.

88 UN Security Council, Report of the General-Secretary, S/8146, 12 September 1967, p. 39, <https://undocs.org/S/8146>; “The Status of Jerusalem,” UN, Committee on the Exercise of the Inalienable Rights of the Palestinian People, p. 16-17, <https://www.un.org/unispal/wp-content/uploads/2016/07/The-Status-of-Jerusalem-English-199708.pdf>; Jeyhun Aliyev, “UN urges respect of status quo of holy sites in Jerusalem,” Anadolu Agency, 8 May 2021, <https://www.aa.com.tr/en/middle-east/un-urges-respect-of-status-quo-of-holy-sites-in-jerusalem/2233258>; Jessie Steinhauer, “Jerusalem and its Holy Sites,” The Cairo Review of Global Affairs, Fall 2017, <https://www.thecaireview.com/timelines/jerusalem-holy-sites/>.

89 “Jordan condemns Israel police harassment of Palestinian Christians near Church of the Holy Sepulchre,” Middle East Monitor, 3 May 2021, <https://www.middleeastmonitor.com/20210503-jordan-condemns-israel-police-harassment-of-palestinian-christians-near-church-of-the-holy-sepulchre/>; UN General Assembly and Security Council, A/ES-10/768-S/2018/180, 7 March 2018, https://www.un.org/unispal/wp-content/uploads/2018/03/A.ES_10.768.S.2018.180.pdf.

90 Marlen Eordegian, “British and Israeli Maintenance of the Status Quo in the Holy Places of Christendom,” International Journal of Middle East Studies, Vol. 35 (2), Cambridge University Press, May 2003, p. 318, <https://www.jstor.org/stable/pdf/3879622.pdf?refreqid=excelsior%3Ac72c56d531c5707722a460dda55a552d>.

91 UN General Assembly and Security Council, A/ES-10/768-S/2018/180, op. cit.; UNSC, Report of the General-Secretary, S/8146, 12 September 1967, p. 39, <https://undocs.org/S/8146>; “The Status of Jerusalem,” op. cit., p. 16; Al-Haq, “Israel’s Occupation Threatens Christian Holy Sites in Jerusalem,” 28 February 2018, <https://www.alhaq.org/palestinian-human-rights-organizations-council/6266.html>.

92 Aness Suheil Barghoti, “Israeli excavations threaten Al-Aqsa Mosque: Experts,” Anadolu Agency, 8 August 2019, <https://www.aa.com.tr/en/middle-east/israeli-excavations-threaten-al-aqsa-mosque-experts/1552432>.

93 Nir Hasson, “Israel Displays Archaeological Finds Looted From West Bank,” Haaretz, 1 January 2019, <https://www.haaretz.com/archaeology/.premium-magic-bowls-model-temple-among-items-looted-in-west-bank-on-display-1.6791180>; Mahmoud Barakat, “Stolen West Bank artifacts displayed at Israeli museum,” Anadolu Agency, 31 December 2018, <https://www.aa.com.tr/en/culture-and-art/stolen-west-bank-artifacts-displayed-at-israeli-museum/1353026>.



been confronted or addressed by Israeli domestic legal mechanisms. While Israel considers East Jerusalem as a legitimate part of its territory, it does not provide for any legal protection regarding non-Jewish cultural heritage located there. Under domestic rule, Israel's Protection of Holy Places Law and Antiquities Law protect cultural heritage and religious sites and ensure freedom of access to them. Yet, no definition of "holy" or "cultural site" exists. Instead, the laws include only an enumeration of protected property which includes 16 sacred places of Judaism and the Regulations for the Protection of Holy Places for Jews: a state approach that has not changed despite a 2004 petition to the Supreme Court regarding the lack of cultural protection for non-Jewish sites.⁹⁴

These events have raised the question of what the applicable protective legal framework is concerning Jerusalem's holy and cultural sites under international law, especially in regards to East Jerusalem's status as an occupied, historic, and religiously unique city. This bulletin will therefore focus on the current legal status that applies to East Jerusalem's religious and cultural sites as well as the international laws and regulations governing the protection of heritage and cultural properties under occupation in general.

PROTECTION OF EAST JERUSALEM'S RELIGIOUS AND CULTURAL SITES UNDER INTERNATIONAL LAW

1. Jerusalem's Holy Sites and Cultural Properties

Under international law, no definition of a holy or religious site exists. Therefore, Jerusalem's holy sites are defined by being included in an ad hoc list that was established by the Ottoman regime and continued by the British Mandate and the UN Conciliation Commission for Palestine (UNCCP). By 1949, it consisted of 97 Christian, Muslim and Jewish holy sites within Jerusalem and provided the scope in which the principle of the status quo should be exercised in order to protect the religious sites of the Holy Land.⁹⁵ Besides that, the UNCCP developed a definition for holy places in regard to Palestine in 1949, in an attempt to reach a binding agreement with Israel that would obligate the latter to safeguard the holy places or let the UN be in charge of the matter. Such an agreement, however, was never reached.⁹⁶

Cultural property is defined in Article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, as "movable or immovable property of great importance to the cultural heritage of every people, [...] whether religious or secular [...], buildings whose main and effective purpose is to preserve or exhibit the movable cultural property [and] centers containing a large amount of cultural property." Hence, it includes sites and places that are considered holy or sacred, as is the case with many of Jerusalem's cultural property, as well as movable cultural property and real estate with cultural relevance, such as museums, libraries and archives.⁹⁷

94 The petition was submitted by Adalah, asking the court to order to the Minister of Religious Affairs to stop neglect and desecration of Muslim holy places in accordance with Paragraph 4 for the Law for the Protection of Holy Sites, and to institute regulations to preserve them just like it is done with respect to Jewish sites. Eitay Mack, "Selectively Sacred: Holy Sites in Jerusalem and its Environs," Emek Shaveh, 11 April 2011, <https://emekshaveh.org/en/wp-content/uploads/2016/04/28-Holy-places-Eng-WEB.pdf>; Katharina Galor, "From Destruction to Preservation," in Galor, K., Finding Jerusalem, University of California Press, 2017, p. 49, <https://www.jstor.org/stable/pdf/10.1525/j.ctt1pq349g.10.pdf?refreqid=excelsior%3Af3c6c75e4adf6db22a7bd9b142163aa>.

95 Eitay Mack, "Selectively Sacred: Holy Sites in Jerusalem and its Environs," op. cit., UN Conciliation Commission for Palestine, A/AC.25/Com.Jer/11, 20 July 1949, [https://unispal.un.org/UNISPAL.NSF/0/ae4f41784aaaf8f1285256af5005e0569; UNCCP, Committee on Jerusalem, "The Holy Places," 8 April 1949, \[http://ecf.org.il/media_items/1467\]\(http://ecf.org.il/media_items/1467\).](https://unispal.un.org/UNISPAL.NSF/0/ae4f41784aaaf8f1285256af5005e0569;UNCCP, Committee on Jerusalem,)

96 Marlen Eordegian, "British and Israeli Maintenance of the Status Quo in the Holy Places of Christendom," op. cit.

97 Sulaf Abdullah Hama Rashid, Alaa Bahaa Omer, Abdulwahab Khairy Ali, "Protection of Cultural Property in





Whether a specific object, structure or site is of such “great importance” is a question for the state on whose territory it is situated. If this state, in good faith, considers a given movable or immovable property to be of great importance to its cultural heritage, the property is cultural property.⁹⁸ In the case of East Jerusalem the “state on whose territory it is situated” is disputed. East Jerusalem is not internationally recognized as part of the state of Israel, but as part of the Palestinian territories occupied in 1967 (prior to which it was under Jordanian control). East Jerusalem is thus seen as an integral part of a (future) Palestinian state⁹⁹ and therefore the Palestinian sovereign may decide upon the aforementioned importance to the cultural heritage. The Palestinian claim is strengthened by the fact that the protection and oversight of movable and immovable cultural heritage was administered by the local civil government of Palestine prior to 1948 rather than from the capital of the British colonizing power.¹⁰⁰ However, in regard to the Al-Aqsa Mosque compound, Israel recognized the Jordanian Waqf Ministry as the competent national authority in 1967 and codified it in the 1994 Washington Declaration and subsequent Peace Treaty with Jordan.¹⁰¹

For legal purposes, the aforementioned definition is valid not only when referring to the 1954 Convention but also when applying provisions of the 1949 Geneva Convention and its protocols. In addition, the International Criminal Court (ICC) applies an even broader definition when prosecuting violations against the laws of war, which will be specified below. The ICC takes into account intangible cultural heritage, which is relevant to the Israeli administration’s limitations and restrictions of Palestinian traditions and symbols as well as the imposition of an Israeli educational curriculum upon Palestinian schools that erases their cultural heritage.¹⁰²

Furthermore, the nature of Jerusalem’s heritage as cultural property is undisputed internationally. The UNESCO General Conference has asserted in many ways since 1968 “the exceptional importance of the cultural property in the Old City of Jerusalem, particularly the Holy Places, not only to the states directly concerned but to all humanity, on account of their artistic, historical and religious value.”¹⁰³

However, in the case of Jerusalem, another aspect plays an important role in regards to the legal status of religious cultural sites: many of Jerusalem’s Christian and Muslim holy sites are administered and owned by a religious endowment, called a waqf (pl: awqaf). Those religious trusts are a common form of institutional administration within the Arab world, and they mostly consist of property held for religious charitable purposes.¹⁰⁴ The biggest waqf in Jerusalem is the Jerusalem Islamic Waqf, which administers, among others, the Al-Aqsa Mosque compound. Its decision-making organ, the Jerusalem Waqf Council, is directly under the control of the Hashemite Kingdom of Jordan, which exercises its custodianship over Jerusalem’s holy sites, including waqf property.¹⁰⁵ In the Old City alone

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98 UNESCO, “Protection of Cultural Property – Military Manual,” 2016, para. 44, <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/MilitaryManuel-En.pdf>.

99 Norwegian Refugee Council, “The Legal Status of East Jerusalem,” December 2013, p. 22, <https://www.nrc.no/globalassets/pdf/reports/the-legal-status-of-east-jerusalem.pdf>.

100 Katharina Galor, “From Destruction to Preservation,” *op. cit.*

101 Victor Kattan, “The Special Role of the Hashemite Kingdom of Jordan in the Muslim Holy Shrines in Jerusalem,” *The Arab Law Quarterly* 2020, 13 July 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3850797.

102 Tamara Tamimi, “Israeli Appropriation of Palestinian Cultural Heritage in Jerusalem,” MIFTAH, p. 2, https://www.un.org/unispal/wp-content/uploads/2019/06/MIFTAH_Submission_1July2019.pdf.

103 “The Status of Jerusalem,” *op. cit.*, p. 29. For more on Palestinian tangible and intangible heritage see PASSIA, *Palestinian Cultural and Religious Heritage in Jerusalem*, PASSIA Bulletin, October 2020, <http://www.passia.org/publications/341>.

104 Haitham Suleiman, “Conflict over Waqf property in Jerusalem: Disputed jurisdictions between civil and Shari’a courts,” *Electronic Journal of Islamic and Middle Eastern Law*, Vol. 3, 2015, University of Zurich, <https://www.zora.uzh.ch/id/eprint/112530/1/Conflict%20over%20Waqf%20property%20in%20Jerusalem.pdf>.

105 Daoud Kuttab, “Will waqf expansion strengthen Jordan’s control of Jerusalem holy sites?,” *Al-Monitor*, 13 April



- excluding the Ash-Sharaf/Al- Mughrabi (Moroccan) Quarter, which Israel renamed “Jewish Quarter” following the 1967 occupation - an estimated 61% of the area and 37% of the property were part of the Islamic or Christian waqf in 1967, increasing since then.¹⁰⁶

Under Islamic law, awqaf are valid only if established irrevocably and in perpetuity,¹⁰⁷ which is why their importance has increased since the Israeli occupation and subsequent illegal annexation of East Jerusalem. In order to protect Arab institutions, the registration of religious property as waqf has risen immensely since 1967 due to the fact that the transfer, sale, seizure and dissolution of waqf property faces a much higher threshold than privately-owned property.¹⁰⁸ Furthermore, the highly criticized Israeli Absentee Property Law does not apply to religious places in Jerusalem, allowing the Islamic holy sites to remain under direct waqf administration.¹⁰⁹ However, even religious or cultural sites registered as awqaf can at times be targeted. Israel has confiscated waqf property by declaring it abandoned or “improper.”¹¹⁰ Examples of this include the destruction of the entire Mughrabi Quarter adjacent to the Al-Buraq (or Western) Wall in the Old City,¹¹¹ the confiscation of the keys to the Mughrabi Gate, the eviction of Palestinians from waqf owned property what became the Jewish Quarter, and the confiscation of a waqf owned school in order to establish the High Rabbinical Court.¹¹²

2. Special Regional Legal Aspects Regarding Religious or Cultural Sites in East Jerusalem

a. The Status Quo

The status quo is a set of legal rights and obligations, created over centuries of practice, that applies to different religions and religious groups with regard to the principal holy places, religious buildings and sites in the Jerusalem area. Its core was set out in an Ottoman firman in 1757, which applied a modus vivendi to holy places with conflicting claims over ownership and the right to hold religious services between the various Christian sects.¹¹³ It was confirmed in another Ottoman firman in 1852 and internationally codified by the 1856 Treaty of Paris and the 1878 Treaty of Berlin, which proclaimed the 1852 decree to be inviolable and extended it to other, non-Christian holy sites. The status quo arrangements were applied during the British Mandate, enshrined in the 1947 UN Partition Plan’s Statute on Jerusalem, and endorsed by the 1949 UN Conciliation Commission on Palestine, which named nine sites as protected by it including the Church of the Holy Sepulcher, the Al-Aqsa Mosque compound, and the Buraq Wall.¹¹⁴

2021, <https://www.al-monitor.com/originals/2021/04/will-waqf-expansion-strengthen-jordans-control-jerusalem-holy-sites/>; “The Islamic Waqf and Al-Aqsa Mosque Affairs,” PASSIA, 2021, <http://www.passia.org/publications/349>.

106 Salim Tamari, “Waqf Endowments in the Old City of Jerusalem: Changing Status and Archival Source,” *Ordinary Jerusalem 1840-1940*, p. 499, <https://www.jstor.org/stable/pdf/10.1163/j.ctvbqs2zk.36.pdf?refreqid=excelsior%3Aaefac6604ff6473d91d50b01a787c871>.

107 Haitham Suleiman, “Conflict over Waqf property in Jerusalem,” *op. cit.*, p. 99.

108 Salim Tamari, “Waqf Endowments in the Old City of Jerusalem,” *op. cit.*

109 Victor Kattan, “The Special Role of the Hashemite Kingdom of Jordan in the Muslim Holy Shrines in Jerusalem,” *op. cit.*

110 Salim Tamari, “Waqf Endowments in the Old City of Jerusalem,” *op. cit.*

111 “The Status Quo in the Al-Aqsa Mosque/Al-Haram Al-Sharif,” State of Palestine, Palestine Liberation Organization, Negotiations Affairs Department, Jerusalem Governorate, September 2021, p. 2.

112 Salim Tamari, “Waqf Endowments in the Old City of Jerusalem,” *op. cit.*; “The Status of Jerusalem,” *op. cit.*, p. 13.

113 Izhak England, “The Legal Status of the Holy Places in Jerusalem,” *Israel Law Review*, Vol. 28 (4), Autumn 1994, pp. 591, 592, <https://www.cambridge.org/core/journals/israel-law-review/article/abs/legal-status-of-the-holy-places-in-jerusalem/OAA5C4965F11AF51E78E095656BC75F3>.

114 UNCCP, Committee on Jerusalem, “The Holy Places,” **8 April 1949**, http://ecf.org.il/media_items/1467.





Regarding its relevance under international law, the status quo in Jerusalem is referred to by UN General Assembly Resolution 181, the so-called Partition Plan, by protecting the “existing rights in respect of the Holy Places”, and this shall be “under the guarantee of the UN”.¹¹⁵ However, Resolution 181 is considered a recommendation under international law and never gained any binding character, and therefore its effect on the status quo is disputed. Yet, due to its nature as a “set of legal obligations that have been created over centuries of practice,” the status quo is nonetheless considered binding international law upon whichever authority that exercises control over Jerusalem, and it supersedes any and all aspects of domestic law.¹¹⁶ The status quo therefore obligates Israel to not interfere in the current situation of the concerned holy sites and protects them regarding their integrity, location, structure, substance and use. Israel, however, never gave any domestic legal effect to the status quo, and is convinced that it has no legal obligation to respect it. Yet it has obeyed it in several court decisions regarding property disputes between Christian sects.¹¹⁷ Regarding the Al-Aqsa Mosque compound, respecting the status quo includes specifically its exclusive use for Muslim worship, that all access be controlled by the Islamic Waqf administration, and that the waqf holds exclusive responsibility for excavations and maintenance. All aspects of this element of the status quo are being increasingly violated by Israel.¹¹⁸

b. The Agreement Between Israel and the Vatican

Since the War of 1948, the Vatican had been trying to reach an agreement regarding the protection of the holy sites of Jerusalem. It has specifically advocated for the internationalization of the city as it was intended in the initial UN Partition Plan of 1947, or even its Vaticanization. In order to prevent such a step and silence the papacy’s demands, Israel proposed special concessions: to alter the status quo of Jerusalem to the benefit of the Catholic Church and detriment of other Christian sects, which the Vatican rejected. After the 1967 War and Israel’s occupation of East Jerusalem, the issue became relevant once again, however, the Vatican expected Israel to unilaterally convey priority status to the Catholic Church in Jerusalem and refused to enter a bilateral agreement in order to not imply that the Vatican recognized Israel’s sovereignty over East Jerusalem. Finally, in 1993, a treaty was signed between the Holy See and Israel, in Art. 4 of which both parties affirm the maintenance and respect for the status quo in the Christian holy places, while Art. 12 leaves a definite solution further on open to negotiation. On the one hand, this strengthens the protection of the status quo, as it is subject to binding treaty law. Art. 4 also guarantees to the Holy See the freedom of Catholic worship and the continuing respect for and protection of the character proper to Catholic sacred places, which has, inter alia, relevance in regard to the threats and access restrictions concerning the Church of the Holy Sepulcher. On the other hand, this is only for Christian sites and is considered unstable due to Art. 12, with many Christians sects claiming that the Catholic Church is still trying to alter the status quo to its own advantage.¹¹⁹

115 UN General Assembly, A/RES/181(II), 29 November 1947, Chapter 1 and 4, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>.

116 UN General Assembly and Security Council, A/ES-10/768–S/2018/180, op. cit.; “The Status Quo in the Al-Aqsa Mosque/Al-Haram Al-Sharif,” State of Palestine et.al., op. cit., p. 1.

117 Marlen Eordegian, “British and Israeli Maintenance of the Status Quo in the Holy Places of Christendom,” op. cit.

118 “The Status Quo in the Al-Aqsa Mosque/Al-Haram Al-Sharif,” State of Palestine et.al., op. cit., p. 3.

119 Ibid., pp. 315ff.



c. The Legal Situation Regarding the Awqaf?

As mentioned, many awqaf in Jerusalem, including the Jerusalem Islamic Waqf and approximately half of the property of the Old City,¹²⁰ have been administered by or accountable to the Ministry of Islamic Affairs and Awqaf in Amman since 1924.¹²¹ Jordan continues to exercise its administrative right and its laws over waqf institutions in Jerusalem. Thus, although Jordanian Law became obsolete with the establishment of the Palestinian Authority in the West Bank and Gaza in 1994, it still forms the legal basis in Jerusalem where the Israeli Authorities do not allow the Palestinian Authority to function.¹²² This led to the special Jordanian custodianship applicable to waqf property in East Jerusalem, and is even regarded as customary international law between Jordan and Israel.¹²³

International customary law is derived from the interpretation of legal intentions and state practices developed over years, so that certain rules ('jus cogens') reflect norms or peremptory norms. They are thought to be internationally recognized and accepted as rules of which no exceptions are ever allowed, regardless of whether a state has signed a certain treaty or not, making them binding on all states. (Vienna Convention on the Law of Treaties (1969) Art. 53).

However, the arrangement became binding treaty law when Jordan and Israel in 1994 signed the Peace Treaty,¹²⁴ which regulates the current custodianship in Art. 9 (2): "Israel respects the present special role of the Hashemite Kingdom of Jordan in Muslim holy shrines in Jerusalem." The provision is effective under international law and must therefore also be considered when examining the laws protecting religious and cultural heritage in Jerusalem. Although its interpretation is disputed, it affirms Israel's obligation to respect the laws in place in the occupied territory, one of which was the Jordanian Law for the Restoration of Al-Aqsa Mosque and the Dome of the Rock, prior to 1967, and also to protect the cultural heritage, an interpretation that is backed by the 2015 Kerry Understandings. The treaty also leaves the competency for access restrictions regarding the Al-Aqsa Mosque with the Jordanian authorities and restricts the applicability of Israeli law within the compound.¹²⁵

The Islamic Waqf in Jerusalem has twice been subject of a UNESCO General Conference resolution in 1987, drawing the "attention of the international community as a matter of urgency to the state of degradation of the Islamic cultural and religious heritage belonging to the Waqf and invites member states, foundations and individuals to support the financial efforts of the Waqf to maintain and restore this heritage"¹²⁶ and listing and documenting the state of the properties and the difficulty their maintenance faces. Although they do not have any direct binding effect under international law, they serve as prove of the violations of heritage protection committed in East Jerusalem and assert the legal claim that the Waqf has to the property.

120 Katharina Galor, "From Destruction to Preservation," op. cit., p. 52.
121 "The Status Quo in the Al-Aqsa Mosque/Al-Haram Al-Sharif," State of Palestine et.al., op. cit., p. 2.
122 Haitham Suleiman, "Conflict over Waqf property in Jerusalem," op. cit., p. 104; Katharina Galor, "From Destruction to Preservation," op. cit., p. 52.
123 Victor Kattan, "The Special Role of the Hashemite Kingdom of Jordan in the Muslim Holy Shrines in Jerusalem," op. cit.
124 Jessie Steinhauer, "Jerusalem and its Holy Sites," op. cit.
125 Victor Kattan, "The Special Role of the Hashemite Kingdom of Jordan in the Muslim Holy Shrines in Jerusalem," op. cit.
126 UNESCO General Conference Resolution 11.6, 20 November 1987, para. 5, <https://unispal.un.org/DPA/DPR/unispal.nsf/85255db800470aa485255d8b004e349a/a252eaa5c301f0888525761e00730836?OpenDocument>.





3. Protection of Cultural Heritage under Public International Law

d. Under the Laws of Occupation

As East Jerusalem, including the Old City, is considered occupied territory under international law, the laws of war referring to occupation are applicable when considering the protection of religious and cultural sites within. The laws of occupation consist specifically of the 1907 Hague Convention, the 1949 Fourth Geneva Convention and certain provisions in its Additional Protocol I, and customary international humanitarian law.¹²⁷ Under those laws, it is generally prohibited for the occupier to confiscate private property and to destruct or seize enemy property, unless absolutely required by military necessity, and the occupying force must respect cultural property.¹²⁸ Those rather vague provisions have gained status as customary law, and therefore provide binding effect upon Israel regardless of any treaty ratifications.

Public International Law is the international law category regulating interactions between provinces and international entities. It is divided into International Human Rights Law (which lays down obligations states are bound to respect), International Humanitarian Law (which only applies during armed conflict), and International Criminal Law (which investigates violators of human rights and humanitarian law via the International Criminal Court).

Many regulations concerning specifically cultural protection during armed conflict and hostilities apply to situations of belligerent occupation as well. The 1954 Hague Convention provides provisions that are applicable within occupation and has two additional protocols, of which Israel signed only the first. The convention and first protocol were ratified by Israel in 1954, which makes them binding upon the Israeli occupying forces acting in East Jerusalem. The second protocol is largely considered customary international law, making it binding on Israel as well.¹²⁹

While Israel has used the fact that Article 5 of the 1954 Hague Convention does not expressly prohibit the occupying powers from engaging in excavations to claim that its archaeological excavations are permissible under international law, Article 5 clearly indicates that the occupying powers must support the “competent national authorities of the occupied country in safeguarding and preserving its cultural property” (Paragraph 1), and “should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close cooperation with such authorities, take the most necessary measures of preservation (Paragraph 2).

Resulting from this mixture of applicable law in regard to cultural protection during belligerent occupation, two main prohibitions arise for the occupying power:

- **Prohibition of destruction and damaging:** The occupying power as the entity that holds effective control over the occupied territory is prohibited from destroying or damaging cultural property unless this is imperatively required by military necessity. Any destruction of cultural property in occupied territory that is not justified by military necessity constitutes a war crime.¹³⁰ In the context of East Jerusalem, for

127 Customary international humanitarian law: questions & answers, ICRC, 15 August 2005, Question 3, <https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm>.

128 Occupation and international humanitarian law: questions and answers, ICRC, 4 August 2004, Question 3, <https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm>.

129 UNESCO, “Protection of Cultural Property – Military Manual,” 2016, op. cit., para. 11.

130 Ibid., para. 179-181.



example the destruction of the Mughrabi Quarter in the Old City just to enlarge the (Al-Buraq) Western Wall's prayer area might constitute such a violation.

- **Prohibition of the use of property for military purposes:** The occupying forces are prohibited to use any cultural property or its immediate surroundings for military purposes if this is likely to lead to deterioration in its state of preservation or expose it to destruction, damage, or desecration by others, except in rare cases where the use is imperatively required by military necessity. During a belligerent occupation, forces are likely to use empty buildings as military headquarters, and such a use is commonly considered as risking its integrity, which is why generally the use of cultural property by the occupying power is considered a violation against the law.¹³¹

Beside those main prohibitions, an occupying force has the general obligation to take all measures within its power to restore and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the occupied territory. This requires it to ensure, as far as possible, the enforcement within the territory of any existing laws and it also permits the occupying power, where necessary, to issue laws itself.

However, the specific rules on the protection of cultural property during belligerent occupation go one step further by requiring, not just permitting, the occupying power to prohibit in relation to the territory any conduct that is detrimental to the protection of cultural property. This obligation represents an exception to the occupying power's general obligation to leave undisturbed the existing legal regime in the territory. The resulting prohibitions issued by the occupying power may practically be in addition to prohibitions already existing in the domestic law of the occupied territory. However, the difference is that they then can be enforced in the military courts of the occupying power, instead of in the local courts.¹³²

Notwithstanding the above, an occupying power must, as mentioned, respect the laws in force in the occupied territory. In the Palestinian territories in general, this applicable domestic legal framework for cultural and natural heritage is an inconsistent one, composed of the British Mandate Law of Antiquities (1929), which is applicable in Gaza, and the Jordanian Law of Antiquities (1966), which is applicable in the West Bank but differs in its enforcement depending on whether it is executed in Area A, B or C.¹³³ In the case of East Jerusalem, the domestic framework is relevant especially in the context of the awqaf, which usually constitute cultural property and are regulated by an own set of Islamic shari'a law and in many cases are administered by the Jordanian Ministry of Islamic Affairs and Awqaf.

Needless to say, all those obligations of the occupier include preventing misconduct by its own forces as well as enforcing the protection of cultural heritage against attacks, misappropriation and desecration by third parties or civilians and organizations.¹³⁴

Resulting as concrete obligations from the above, the occupier must take all necessary and reasonable measures within its power to do the following:

- **Prohibit vandalism committed by the occupying forces:** All forms of theft, pillage or other misappropriation or vandalism of cultural property by military forces are absolutely prohibited during belligerent occupation. Those acts constitute war crimes.¹³⁵

131 Ibid., para. 182 -184.

132 Ibid., para. 201.

133 Nazmi Al-Ju'beh, "Cultural Heritage in Palestine, Contested and Neglected Heritage. A Palestinian Position," p. 4, http://www.cccb.org/rcs_gene/nazmi_al-jubeh.pdf.

134 UNESCO, "Protection of Cultural Property – Military Manual," 2016, para. 174, 175, op. cit.

135 Ibid., para. 185, 186.





- **Prevent vandalism by third parties or civilian actors:** Occupying forces must take all necessary and reasonable steps to prohibit, prevent, and, if necessary, halt the commission of such acts by others, including by organized criminal groups. As mentioned above, the protection of cultural property goes beyond the obligation of enforcing existing laws prohibiting misappropriation or vandalism of cultural property in the territory, but actually requires the occupying power to establish prohibitions of all forms of theft, pillage or other misappropriation and of vandalism of cultural property.¹³⁶
- **Actively support the local authority of the occupied territory in safeguarding and preserving cultural property:** Notwithstanding the specific obligations in regard to cultural property imposed by international law on the occupying power, the task of conserving cultural property in the territory continues to fall during belligerent occupation to the competent authorities of the occupied territory. Therefore, an occupying power must, unless absolutely prevented from doing so, leave intact and free to function the administrative authorities responsible for cultural property in the occupied territory. However, additionally to that it must help in safeguarding and preserving cultural property and especially take measures after the cessation of active hostilities to maintain the state of cultural property in the occupied territory - measures that would ordinarily be considered peacetime measures. The occupier must, as far as possible, assist the competent authorities in implementing the legislative and administrative regime in force in the territory for the preservation of cultural property. This includes, for example, helping to ensure compliance with local planning laws regulating construction on or near sensitive sites, laws on the upkeep and alteration of historic buildings, laws pertaining to the authorization of archaeological excavations, and laws governing the trade in art and antiquities, including export controls.¹³⁷ This provision again is especially relevant in East Jerusalem, as it relates to and protects the role, duties and rights the Jordanian Ministry of Islamic Affairs and Awqaf has in regard to those waqf property that is considered cultural property.
- **Prevent illicit transfer of ownership of cultural property:** The occupying power must, unless absolutely prevented from doing so, comply with any existing laws regulating the transfer of ownership of cultural property in the territory, must actively prevent any illicit acts regarding such transfers, and must refrain from authorizing or committing any such transfers itself.¹³⁸ This is relevant especially in regard to artifacts that have been transferred from Palestinian territory into Israeli possession, mostly museums or government custody, which violates international law, especially in the case of displaying or exhibiting the artifacts.¹³⁹
- **Prevent archeological excavations:** Art. 9 (1)(b) of the 1999 Second Protocol to the 1954 Hague Convention requires an occupying power to prohibit and prevent any archaeological excavation in the occupied territory, except where this is strictly required to safeguard, record or preserve cultural property. Israel is not party to the protocol. However, its Art. 9 (1)(b) is commonly viewed as customary law,¹⁴⁰ making it binding upon Israel nonetheless. Consistent with the above-mentioned obligations, the occupying force must also, except absolutely prevented from doing so, comply with any existing laws regulating the authorization of archaeological excavations in

136 Ibid., Para 187-194.

137 Ibid., Para. 195-200.

138 Ibid., Para 201-205, 171.

139 Nir Hasson, "Israel Displays Archaeological Finds Looted From West Bank," *op. cit.*

140 UNESCO, "Protection of Cultural Property – Military Manual," 2016, *op. cit.*, para. 207.



the territory and respect the competent local authorities. Where a legal framework on archaeological excavations is in place, the occupier must not engage in or sponsor digs in the territory except in accordance with the applicable law, which includes the prohibition of authorizing any excavations itself.¹⁴¹ The exceptions only allow an occupying power to permit the continuation of digs in progress insofar as this is necessary to record finds already unearthed and to prepare the site for suspension of the work and to authorize new digs insofar as they are essential to protect and record any finds thrown up by military operations or otherwise uncovered over the course of the occupation. This latter point is backed by the “Recommendation on International Principles Applicable to Archaeological Excavations,” adopted by the General Conference of UNESCO in 1956, which states that, in the event of chance finds being made, particularly during military works, the occupying power should take all possible measures to protect these finds. Art. 9 (2) adds that any archaeological excavation that does take place in occupied territory must, unless circumstances do not permit, be carried out in close cooperation with the competent national authorities of the occupied territory.¹⁴² For East Jerusalem, this may be the Palestinian or the Jordanian authorities, however, this aspect is highly disputed.

- In Jerusalem’s Old City, Israeli archeological excavations began as early as 1968, one year after its occupation, on behalf of the Rabbinate and the Ministry of Religious Affairs. The excavations intended to find traces of the Second Jewish Temple by excavating the tunnels located along the western wall (Al-Buraq Wall) of the Al-Aqsa Mosque compound. It was neither necessary under Art. 9, nor was it executed in close cooperation with any national authority. It thereby violated the laws of war. That the excavations also led to the partial collapse of adjacent historic buildings may constitute a violation as well.¹⁴³ To this day, civil organizations, on behalf of the Israeli state, carry out archeological excavations that are contrary to International Humanitarian Law¹⁴⁴ as they are neither necessary in order to protect a site nor to record chance finds.
- **Prohibit alterations and change of use of cultural property:** This prohibition stems from Art. 9 (1) of the 1999 Second Protocol to the 1954 Hague Convention, yet is regarded as customary law and thereby binding upon Israel as the occupying power in East Jerusalem. The occupying power must prohibit, prevent, and not engage in “any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence” (Art. 9 (1)(c)). Alteration of cultural property involves changes to the fabric of the object, structure or site. In addition, it must, unless absolutely prevented from doing so, comply with any existing laws regulating such alterations or change of use in the territory. Only those alterations to or changes of use of cultural property in occupied territory that are intended to destroy or conceal cultural, historical or scientific evidence fall within the occupying power’s obligations of prohibition and prevention. Where, however, any permissible alteration or change of use cultural property in occupied territory takes place, Article 9 (2) specifies that it must, unless circumstances do not permit, “be carried out in close co-operation with the competent national authorities of the occupied territory.”¹⁴⁵ In the case of East Jerusalem, this again raises the question of

141 Ibid., para. 171, 172.

142 Ibid., para. 206-209.

143 “The Status of Jerusalem,” op. cit., p. 16.

144 Katharina Galor, “From Destruction to Preservation,” op. cit., p. 49; for details on specific excavation projects see: Ahmad A. Rjoob, Palestinian Ministry of Tourism and Antiquities, “The Impact of Israeli Occupation on the Conservation of Cultural Heritage Sites in the Occupied Palestinian Territories: The Case of ‘Salvage Excavations’,” Conservation and MGMT of Arch. Sites, Vol. 11 (3-4), 2009, pp. 214-235.

145 UNESCO, “Protection of Cultural Property – Military Manual,” 2016, op. cit., para. 210-212.





who the competent national authorities are. Independent from that, the provision gains relevance in the context of the ongoing Judaization of East Jerusalem and the repurposing of cultural property.¹⁴⁶

e. Under the Laws of Armed Conflict

As East Jerusalem periodically experiences clashes and waves of violence that for the sake of definition may potentially amount to an international armed conflict,¹⁴⁷ and incidents of violence often take place within or in the immediate surroundings of cultural property, it is important to include in this overview those legal provisions that protect cultural heritage within armed conflict.

As mentioned above, most obligations of the occupying forces that relate to the protection of cultural property derive not explicitly from the laws of occupation, but rather from general humanitarian law that applies to international armed conflicts. Though most of the provisions have already been discussed, the following will be a short listing of all applicable obligations of belligerents. The legal framework in general is customary international law of armed conflict, the 1954 Hague Convention and its protocols, the 1949 Geneva Convention as well as its Additional Protocols I & II, which specifically refer to the protection of cultural heritage in Art. 53 AP I and Art. 16 AP II. As Israel is not party to the Additional Protocols, their binding nature in our case is disputed. While AP I is considered customary law and therefore binding on all states, AP II is seen as not binding upon Israel. However, the provisions contained in the protocols are consistent with the overall regulations of cultural protection during armed conflict, especially those in the 1954 Hague Convention, which is why the problem of bindingness does not constitute an actual gap of accountability and scope in our case.

Specifically, the provisions include the following:

- **Prohibition of attacking cultural property on the enemy's territory:** Unless it becomes a military objective and there is no feasible alternative for obtaining a similar military advantage, no party to the conflict may make a cultural property object of an attack, in other words of an act of violence. An unlawful attack is considered a war crime.¹⁴⁸
- **Prohibition of launching an attack that may be expected to cause incidental damage to cultural property:** Such attack is considered illegal, if it would be excessive in relation to the concrete and direct military advantage that was anticipated by it.¹⁴⁹
- **Prohibition of destroying or damaging cultural property under one's own control:** Unless it is imperatively required by military necessity, the damaging or destruction of cultural property - wanton destruction - is prohibited and constitutes a war crime. In other words, no alternative to the destruction must exist from a military point of view.¹⁵⁰ In the case of armed conflict during a situation of occupation, although not part of Israel East Jerusalem as an occupied territory will be regarded as under Israel's control.
- **The prohibition of all seizure of institutions dedicated to religion, charity, educa-**

146 PASSIA, *Palestinian Cultural and Religious Heritage in Jerusalem*, op. cit.

147 Supreme Court of Israel, "The Targeted Killings Case," **HCI 769/02**, para. 16, 18, <https://casebook.icrc.org/case-study/israel-targeted-killings-case>.

148 UNESCO, "Protection of Cultural Property – Military Manual," 2016, op. cit., para. 84-94.

149 Ibid., para. 112-115.

150 Ibid., para. 125-127.



tion, the arts and sciences, historic monuments and works of art and science: Under customary international law of armed conflict, cultural property may not be seized.¹⁵¹

- **Prohibition of making any use of cultural property or its immediate surroundings:** Making use of cultural property for purposes likely to expose the property to destruction or damage in the event of armed conflict is prohibited, unless it is imperatively required by military necessity. This phrasing covers also passive or de facto use during a military operation.¹⁵²
- **Obligation to take, to the maximum extent feasible, the necessary precautions to protect cultural property:** Cultural property under the party's control must be protected by all means possible and necessary against the dangers resulting from military operations.¹⁵³ Again, cultural property in East Jerusalem will be considered under Israel's control due to the ongoing occupation.
- **Obligation to avoid, to the maximum extent feasible, the location of military objectives near cultural property:** Similar to the above obligation, all conflicting parties must by all means possible and necessary avoid locating military objectives in the vicinity of cultural property, in order to minimize the risk of damage to it. While there is no rule regarding the distance, it should be assessed reasonably by the party.¹⁵⁴
- **Regarding misappropriation or vandalism against cultural property:** The parties to the conflict are prohibited from misappropriating or vandalizing cultural property by their own forces, which can never be justified by military necessity, as well as being obligated to prevent theft, misappropriation and vandalism of cultural property by others, if the party has sufficient control over the property.¹⁵⁵
- **Prohibition of making cultural property the object of reprisals:** Just as reprisals are generally considered illegal under the laws of armed conflict, reprisals against cultural property have no justified military necessity, which make them a violation against international law.¹⁵⁶

f. Under International Criminal Law/ the International Criminal Court's Rome Statute

As mentioned above, some violations of the laws of occupation or armed conflict, such as the destruction, damage and misappropriation of cultural property, can amount to war crimes, as in the past many war tribunals have confirmed by convicting perpetrators for committing such acts. In addition, some trials, international as well as domestic, have considered acts against cultural property during conflict or occupation as crimes against humanity¹⁵⁷ and the ICC itself states that crimes against cultural property can potentially constitute or form part of war crimes, crimes against humanity, genocide, and the crime of aggression, and can therefore be prosecuted as such.¹⁵⁸

151 ICRC, IHL Database, Customary IHL, Rule 40. Respect for Cultural Property, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule40.

152 ICRC, IHL Database, Customary IHL, Rule 39. Use of Cultural Property for Military Purposes, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule39; UNESCO, "Protection of Cultural Property – Military Manual," 2016, op. cit., para. 130-137.

153 Ibid., para. 142-144.

154 Ibid., para. 150-151.

155 Ibid., para. 152-161.

156 Ibid., para. 162.

157 Ibid., para. 18.

158 International Criminal Court, Policy on Cultural Heritage, June 2021, para. 37, <https://www.icc-cpi.int/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf>.





Regarding the scope that the ICC applies to the objects of attack or violation, it is important to mention that the definition here is broader than under the laws of war. The ICC includes not only tangible and intangible religious as well as secular cultural property, but also cultural heritage in form of natural sites of cultural value.¹⁵⁹ This may be of importance in Jerusalem, as it hence also sanctions damage and destruction of places like the hill of Golgotha/Calvary and the many caves of historic significance. Regarding intangible cultural property, the term includes lived expressions inherited from ancestors i.e., anything from oral traditions to performing arts, rituals and handcraft traditions, practices, representations, expressions, knowledge, skills and attributes of cultures.¹⁶⁰ The ICC takes into account the Representative List of the Intangible Cultural Heritage of Humanity that was established in the 2003 UNESCO Convention and in which Palestine included its crafts, professions and social and cultural traditions, customs and practices regarding the date palm, as well as its Hikaye, a kind of social critical narrative expression practiced by Palestinian women.¹⁶¹

In East Jerusalem, the following criminal law provisions are relevant:

- **Specific provisions concerning the violation of cultural property:** The Rome Statute, which governs the prosecution of crimes by the ICC, directly criminalizes attacks against cultural property only as war crimes in Art. 8(2)(b)(ix) and 8(2)(e)(iv), where a serious violation is considered “intentionally directing attacks against buildings dedicated to religion, [...] art, [...] or charitable purposes, historic monuments, [...], provided they are not military objectives”, during international conflict as well as hostilities within one state.¹⁶² In the context of cultural property in Jerusalem, only the former is relevant, as it applies to armed conflict involving more than one state, as well as to belligerent occupation.¹⁶³
- **Violations falling within the scope of general provisions:** Yet, the ICC also prosecutes similar acts more generally under several other provision of the Rome Statute, of which war crimes and crimes against humanity are relevant in the matter of Jerusalem.
- **War crimes (Art. 8):** Relevant in the matter of East Jerusalem, which is considered an international armed conflict, are Art. 8(2)(a)(iv) and 8(2)(b)(ii),(iv),(xiii) and (xvi), which prohibit “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”, “directing attacks against civilian objects”, causing “incidental [...] damage to civilians objects”, “destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war”, and “pillaging a town or place, even when taken by assault” which all include cultural property in their scope, thereby protecting it.¹⁶⁴
- **Crimes against humanity (Art. 7):** Regarding the prosecution of violations against cultural property as a crime against humanity, the ICC examines whether the violation constitutes a widespread or systematic attack against the civilian population. In the issue of East Jerusalem, this could become an interesting aspect, considering

159 Ibid., para. 3, 16.

160 Ibid., para. 15f.

161 “Date palm, knowledge, skills, traditions and practices,” UNESCO, Intangible Cultural Heritage, <https://ich.unesco.org/en/RL/date-palm-knowledge-skills-traditions-and-practices-01509>; “Palestinian Hikaye,” UNESCO, Intangible Cultural Heritage, <https://ich.unesco.org/en/RL/palestinian-hikaye-00124>.

162 Ibid., para. 14.

163 The occupation of Jerusalem is legally considered an international armed conflict, as mentioned before.

164 UNESCO, “Protection of Cultural Property – Military Manual,” 2016, op. cit., para. 13-17; International Criminal Court, Policy on Cultural Heritage, op. cit., para. 48ff.



the armed operations that are regularly carried out on the Al-Aqsa Mosque compound by Israeli forces pursuant to state policy and are directed in a discriminatory manner against the worshippers there, fulfilling the formal requirements of Art. 7(1) Rome Statute.

Given the above, the crime against humanity of torture as per Art. 7(1)(f) may be committed by the destruction of cultural heritage, as the ICC had decided in the so-called Al-Mahdi case¹⁶⁵, for it may cause severe mental suffering to the people that have a strong connection to it. This may apply to Jerusalem, regarding the damage caused to cultural properties, e.g., to the Al-Aqsa Mosque compound, and the emotional attachment Palestinians have to many religious sites in Jerusalem.

In some cases, acts affecting cultural property or heritage can even amount to persecution as a crime against humanity, Art. 7(1)(h), if those acts infringe traditional or cultural practices and deprive persons belonging to an identifiable group of their fundamental rights.¹⁶⁶ This may also be applicable for Jerusalem, where religious sites are increasingly subject to discriminatory policies and therefore a certain identifiable group - often the Muslim Palestinians - are prevented from access and hence from pursuing their right to freedom of religion. The banning of flags, signs and other Palestinian symbols, such as the Kuffiyeh (traditional head scarf), may also fall within the scope.

In recent years, the ICC, as the most powerful international mechanism of prosecuting violations against the laws of war, has underlined its will to prosecute violations against cultural property and thereby set the safeguarding of cultural heritage as one of its priorities. It has demonstrated this intention in the rather symbolic Al-Mahdi case mentioned above.

Israeli violations against cultural heritage in Jerusalem are usually not addressed by an Israeli court or any other judicial mechanism that would provide protection or remedy - an obligation which is even codified in Art. 28 of the 1954 Hague Convention.¹⁶⁷ It is also unlikely that this will change in the near future, as most violations are committed by state forces or are at least state sanctioned and not regarded as illegal under Israeli domestic law. This fulfills the requirement of complementarity, which governs the admissibility of cases in front of the ICC: As Israel proves unwilling to address any acts that damage cultural heritage, the ICC is permitted to potentially commence a proceeding. Besides that, despite Israel not having ratified the Rome Statute, the ICC has confirmed its jurisdiction over Israeli activities in the Palestinian territories.¹⁶⁸

g. Under International Human Rights Law

Furthermore, it is by now undisputed that an ongoing occupation, such as that of East Jerusalem, and therefore the applicability of the laws of belligerent occupation, do not infringe the applicability of international human rights law. This means that the population living under occupation enjoys human rights that must not be violated by the occupation forces.¹⁶⁹ In addition, international human rights protect not only citizens of a state, but all

¹⁶⁵ Case against Ahmad Al-Faqi Al-Mahdi who was associated with Al-Qaeda and found guilty in 2015 in violating religious cultural heritage in Mali in 2012, <https://www.icc-cpi.int/mali/al-mahdi>.

¹⁶⁶ International Criminal Court, Policy on Cultural Heritage, op. cit., para. para. 63ff.

¹⁶⁷ Art. 28: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention."

¹⁶⁸ International Criminal Court, "Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine," 3 March 2021, <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine>.

¹⁶⁹ ICRC, "IHL and Human Rights," in How Does Law Protect in War, <https://casebook.icrc.org/law/ihl-and-human-rights>.





individuals under a state's jurisdiction, therefore including the population of occupied territory into the scope of a state's obligation to ensure those rights, as relevant for the case of East Jerusalem.

This being said, acts committed against cultural property, tangible or intangible, may fall within the scope of international human rights law, if such attacks destroy the possibility of individuals, irrespective of association with national, ethnical, racial, or religious groups, to access, participate in and contribute without discrimination to cultural life, which is often the case when objects of cultural value are damaged, desecrated, repurposed, or stolen with the aim of harming the people to whom they are intrinsically linked.¹⁷⁰ Such violations against cultural property then directly relate to the international human rights norms, that protect the according rights of those people, an approach that was confirmed in its validity as per Art. 4 of the UNESCO Universal Declaration of Cultural Diversity and in a Note by the UN Secretary-General, which states that "prima facie, destruction of cultural heritage must be considered a violation of cultural rights."¹⁷¹ Affected human rights can be freedom from discrimination, freedom of expression, freedom of thought, freedom of conscience and religion, the right to self-determination, the right to education, the right to development, economic rights.¹⁷² The following are some examples that might be applicable in East Jerusalem:

- **General cultural rights:** In the case of East Jerusalem these will most likely be Art. 15(1)(a) International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to access to, and enjoyment of, all forms of cultural heritage, including the right to take part in cultural life, in times of war or peace.¹⁷³ Israel is party to the Treaty, binding it to the obligation of providing the people of Jerusalem those rights. Also Art. 27 of the Universal Declaration of Human Rights confers on every person the right to freely participate in the cultural life of the community. Although the declaration itself is not binding, many provisions are considered to have customary law character. In the case of Art. 27 however, this is disputed, with the UN General Assembly promoting the binding character of the Declaration upon all UN member states, Israel being one of them.¹⁷⁴
- **Minority and indigenous rights:** Also Art. 27 International Covenant on Civil and Political Rights (ICCPR) could be violated, the right of minorities to enjoy their own culture, and Art. 3, 8, 11, 12, 14, 31 UN Declaration on the Rights of Indigenous People, the rights of indigenous peoples to self-determination and cultural heritage. Israel is party to the former, thereby bound to the obligation of ensuring that the Palestinian community can enjoy their culture, which logically includes the protection of their cultural heritage. However, the latter UN Declaration is, regardless of the fact that Israel never signed it, not a binding instrument of international law, but rather a representation of a broad consensus of the international community, having merely

170 International Criminal Court, Policy on Cultural Heritage, op. cit., para. 28.

171 UN General Assembly, "Cultural Rights, Note by the Secretary-General," A/71/317, 9 August 2016, para. 13, <https://undocs.org/en/A/71/317>.

172 Ibid. para. 13, 34.

173 UN Economic and Social Council, "General Comment 21," ICESCR (E/C.12/GC/21), 21 December 2009, para. 50 (a), <https://www.refworld.org/docid/4ed35bae2.html>.

174 European Parliament, "The Universal Declaration of Human Rights and its relevance for the European Union," [https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA\(2018\)628295_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA(2018)628295_EN.pdf); UN Human Rights Office of the High Commissioner, "The European Union and International Human Rights Law," p. 23, https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf; Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law," *Ga. J. Int'l & Comp. L.* 287 (1996), p. 348, <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1396&context=gjcl>.



a “moral force” on the practice of states.¹⁷⁵ It may indicate principles widely accepted, and may even constitute binding customary law. The exact extent of those provisions with customary law status is disputed. However, it is commonly agreed upon that “indigenous peoples are entitled to maintain and develop their distinct cultural identity.”¹⁷⁶ The aforementioned articles, relating to cultural development, identity, tangible and intangible cultural heritage, religious sites and education therefore may have customary character, providing enforceable protection for Jerusalem’s heritage, as Palestinians are commonly agreed on to be the indigenous population of Palestine.¹⁷⁷

- **Religious rights:** In the case of religious sites, the violations are also directly related to the concerned populations’ right to freedom of religion as per Art. 18 ICCPR, which protects the freedom to exercise and manifest one’s religion and binds Israel as a state party. It may become relevant when prohibiting access to sites of prayer for worshippers, such as it happens regularly in regard to the Al-Aqsa compound. Also Art. 18 of the Universal Declaration of Human Rights protects freedom of religion. However, again it is not a binding instrument in itself, and the customary law status of Art. 18 is disputed.¹⁷⁸

In regard to Palestinian cultural heritage violated by civilians, i.e. Jewish extremists and settlers, East Jerusalem’s cultural property protection might even benefit from Art. 20(2) ICCPR. It obligates Israel to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and has been invoked by human rights organizations in regard to settler violence.¹⁷⁹ Hence, Israel is required to prevent by law any extremist desecration of cultural heritage in East Jerusalem, thereby protecting the latter.

The UN Human Rights Council (UNHRC), established through the UN General Assembly in 2006,¹⁸⁰ has repeatedly emphasized the importance of cultural rights and cultural protection in relation to human rights since 2016, convening a seminar on the topic and issuing two resolutions in which it recognized the global importance of tangible as well as intangible cultural property and condemned all acts of unlawful destruction.¹⁸¹ The resolutions have no binding effect, but are expected to promote political support of cultural protection and can in the long run influence the establishment of best practice principles and customary law.¹⁸² In 2011, the UNHRC also adopted a resolution directly referring to the situation in East Jerusalem, where it demands of Israel as the occupying power to stop the systematic destruction of cultural heritage of the Palestinian people and to respect the religious cultural rights provided by human rights law.¹⁸³

175 UN Office of the High Commissioner of Human Rights, Leaflet No 2: Indigenous Peoples, the UN and Human Rights, p. 2, <https://www.ohchr.org/Documents/Publications/GuideIPleaflet2en.pdf>.

176 Siegfried Wiessner, “Introductory Note, United Nations Declaration on the Rights of Indigenous Peoples, General Assembly, Resolution 61/295,” Audiovisual Library of International Law, chapter IV, September 2007, https://legal.un.org/avl/ha/ga_61-295/ga_61-295.html.

177 “The International Status of the Palestinian People,” in UN, The Question of Palestine, 1981, <https://www.un.org/unispal/document/auto-insert-204352/>.

178 Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law,” op. cit., p. 347.

179 Yesh Din, Israel’s Compliance with the International Covenant for Civil and Political Rights, Shadow Report to the Fourth Periodic Report of Israel, October 2014, p. 14, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ISR/INT_CCPR_CSS_ISR_18231_E.pdf.

180 UN Human Rights Council, “Welcome to the Human Rights Council,” <https://www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx>.

181 Resolutions A/HRC/RES/37/17 and A/HRC/RES/33/20, Seminar report A/HRC/37/29.

182 “The Human Rights Council, A Practical Guide,” Permanent Mission of Switzerland to the UN Office and to the other international organisations in Geneva, 2014, p. 18.

183 UN General Assembly, Resolution adopted by the Human Rights Council, A/HRC/RES/16/29, 13 April 2011, para. 4-6.





Besides that, the UN Special Rapporteur in the field of cultural rights, Karima Bennouna, declared in her 2016 report submitted in accordance with the UNHRC, that the protection of defenders of cultural heritage is an important but insufficiently regarded aspect of cultural protection in itself. Attacks against individuals who play a central role in protecting cultural heritage of a country or group should also be considered when assessing the protective mechanism in regard to heritage preservation, as their risk of physical harm and restricted access to cultural sites is directly connected to the risk of loss of knowledge, expertise and experience. This approach is already codified in Art. 17 (2) of the 1954 Hague Convention, yet does not bear much relevancy in reality. The Special Rapporteur also claims that those cultural heritage defenders should be recognized and protected as human rights defenders by the international community.¹⁸⁴

h. Under the World Heritage Convention (1972)

The World Heritage Convention, established in 1972 under the auspices of the UNESCO General Conference, is the basis for defining and identifying natural and cultural sites that may be considered for inscription on the World Heritage List. Its state parties obligate themselves to protect and conserve the listed heritage sites on their territory and but also to respect heritage sites on the territory of other state parties.¹⁸⁵

In the context of Jerusalem, the convention is relevant for two reasons: Both Palestine and Israel are party to the convention, making it binding upon them.¹⁸⁶ Besides that, the entire Old City of Jerusalem, including its city walls, was enlisted as a UNESCO World Heritage Site on the World Heritage List in 1981, on the initiative of Jordan, and on the World Heritage in Danger List in 1982. The hills of occupied south Jerusalem, as far as Battir, are also enlisted as protected natural heritage by UNESCO. As the World Heritage Convention does not cease to apply during armed conflict or occupation, it is an integral part of international law concerning cultural protection in East Jerusalem.¹⁸⁷

What exactly are the subsequent obligations? According to Art. 6 (3) of the Convention, “each State Party [...] undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage [...] situated on the territory of other States Parties to this Convention”. Hence, the Old City of Jerusalem including every building and structure is protected under the convention against state forces’ detrimental action directed against them, which includes belligerent attacks against their physical integrity, e.g., damage caused to the Al-Aqsa Mosque compound during military activities carried out, but also administrative acts such as change of the substance of a heritage site or activities risking or causing damage, such as archeological excavations under the Old City.

The World Heritage Convention’s implementation is governed by the World Heritage Committee, which decides upon the status of a property as world heritage and thereby including it in the World Heritage List and the List of World Heritage in Danger, and also issues decisions regarding matters related to the convention.¹⁸⁸ Concerning Jerusalem, the Committee has issued countless decisions, condemning violations against Jerusalem’s heritage and affirming its status as endangered heritage due to deterioration of monuments and the lack of maintenance and responsible management.¹⁸⁹ However, the Committee’s de-

184 UN General Assembly, “Cultural Rights, Note by the Secretary-General,” op. cit., para. 68-75.

185 “The World Heritage Convention,” UNESCO, World Heritage Center, <https://whc.unesco.org/en/convention/>.

186 “States Parties Ratification Status,” UNESCO, World Heritage Center, <https://whc.unesco.org/pg.cfm?cid=246>.

187 UNESCO, “Protection of Cultural Property – Military Manual,” 2016, op. cit., para. 24.

188 “The World Heritage Committee,” UNESCO, World Heritage Center, <https://whc.unesco.org/en/committee/>.

189 “Nomination of the “Old City of Jerusalem and its Walls” to the list of World Heritage in danger,” UNESCO, World



cisions are binding only in regard to the Convention and the lists themselves, and do not confer concrete binding obligations upon Israel.

i. Under the 1970 Convention on Illicit Import, Export and Transfer of Ownership of Property

Israel never became party to this UNESCO Convention.¹⁹⁰ It is not considered reflective of customary law, which is why its provisions do not confer any obligations upon Israel. Although Palestine is party to the Convention, this does not affect the legal situation concerning East Jerusalem, as its provisions mainly impose obligations upon the states parties towards their own cultural heritage and towards other states parties. Art. 5, for example, obligates the states parties to protect their cultural property as appropriate, however, in the case of East Jerusalem; Palestine cannot implement any such measures due to Israel's illegal annexation.

j. Under the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

Israel is not party to this Convention¹⁹¹ which complements the public law provisions of the above-mentioned 1970 Convention on Illicit Import, Export and Transfer of Ownership of Property in regard to provisions regulating civil law matters of illicit transfer.¹⁹² Its provisions also do not appear to constitute norms of customary law.¹⁹³ Therefore it has no effect on international legal protection of cultural heritage in East Jerusalem. Palestine did not ratify the treaty either.¹⁹⁴

k. Under other UNESCO Conventions

Israel is not party to neither the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage nor the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.¹⁹⁵ Palestine is party to all of those,¹⁹⁶ however, here again the conventions cannot impose obligations against non-party states, and therefore have no impact on cultural protection in East Jerusalem. The 2001 Convention, for example, provides benefits such as cooperation and joint action for cultural protection, however, only between states parties themselves,¹⁹⁷ and the same is true for the others.¹⁹⁸ However, the 2003 Convention defines the scope of intangible heritage¹⁹⁹ and did lead to the enlisting of some Palestinian traditions as cultural heritage, which strengthens their protection under international criminal law, as mentioned above. Most recently, UNESCO has added

Heritage Center, <https://whc.unesco.org/en/decisions/5284/>.

190 UNESCO, Information Kit - Convention for the fight against the illicit trafficking of cultural property, p. 26, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Infokit_ENG.pdf.

191 UNIDROIT, Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995) – Status, <https://www.unidroit.org/status-cp>.

192 UNESCO, Information Kit - Convention for the fight against the illicit trafficking of cultural property, op. cit., p. 4.

193 UNIDROIT, The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, An Overview, <https://www.unidroit.org/overviecp/english>.

194 UNESCO, Information Kit - Convention for the fight against the illicit trafficking of cultural property, op. cit., p. 27.

195 UNESCO, Conventions, Israel, <https://en.unesco.org/countries/israel/conventions>.

196 UNESCO, Conventions, Palestine, <https://en.unesco.org/countries/palestine/conventions>.

197 “Ratification of the 2001 Convention,” UNESCO, Underwater Heritage, <https://en.unesco.org/underwater-heritage/ratification>.

198 “Advantages and Benefits of Ratification, Model Instrument of Ratification,” <https://ich.unesco.org/doc/src/00277-EN.doc>.

199 “What is Intangible Cultural Heritage?,” UNESCO, Intangible Cultural Heritage, <https://ich.unesco.org/en/what-is-intangible-heritage-00003>.





the “art of embroidery in Palestine, practices, skills, knowledge and rituals” to its Intangible Cultural Heritage List in December 2021.²⁰⁰

The 2005 Convention further aims at reaffirming the sovereign rights of states to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory. While this theoretically strengthens the Palestinian right to sovereignty in East Jerusalem, in reality it does not provide any mechanism of achieving it.²⁰¹

I. Under the UNESCO Declaration on the Intentional Destruction of Cultural Heritage

The UNESCO General Conference is able to adopt declarations, which “set forth universal principles to which the community of States wished to attribute the greatest possible authority and to afford the broadest possible support.”²⁰² They do not need to be ratified by the member states, and hence do not confer directly binding obligations. However, for reasons of assessing international best practices, standard and the development of customary law, it is interesting to note that the UNESCO adopted a declaration specifically on intentional destruction of cultural heritage in 2003. It refers to the 1907 and 1954 Hague Conventions and the ICC’s Rome Statute, as well as to peace time and situations of armed conflict, and includes state responsibility and individual criminal responsibility. The declaration, despite having no binding character, strengthens the international stance on cultural protection and underlines the importance it is given.²⁰³

m. Under the UNESCO General Conference

As per Art. 23 (2) of the 1954 Hague Convention, the UNESCO is authorized to make, on its own initiative, proposals to the state parties on issues relating to the application of the convention. Besides that, according to Art. IV (4) of the UNESCO Constitution, the General Conference can issue recommendations, which do not need state ratification in order to establish effect. Those recommendations concern principles and norms relating to topics governed by UNESCO and invite the member states to apply those guidelines. Although they do not constitute bindingness under international law,²⁰⁴ states are required to accept them nonetheless as per the UNESCO’s constitution. Due to the UNESCO’s internationally accepted authority, recommendations are expected to influence member states’ policies, and do set specific obligations upon member states in some cases.²⁰⁵ Regarding East Jerusalem, Palestine has been a member of UNESCO since 2011, whereas Israel withdrew from the organization in 2018, accusing it of anti-Israel bias due to the numerous critiques UNESCO has issued regarding the protection of Jerusalem’s Old City.²⁰⁶

200 “From the Palestinian Bearers of Heritage to the UNESCO’s Representative list of the Intangible Cultural Heritage of Humanity,” Ramallah, December 2021, <https://en.unesco.org/news/palestinian-bearers-heritage-unescos-representative-list-intangible-cultural-heritage-humanity>.

201 UNESCO, The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, <https://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf>.

202 “General introduction to the standard-setting instruments of UNESCO,” UNESCO, Legal Instruments, http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html#4.

203 For the Declaration’s full text see: https://international-review.icrc.org/sites/default/files/irrc_854_unesco_eng.pdf.

204 UNESCO, “What types of legal instrument does UNESCO use at the international level to protect the cultural heritage?,” <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/international-legal-instruments>; UNESCO Executive Board, 197EX/20 Part V, Annex, para. 2, 7 August 2015.

205 “General introduction to the standard-setting instruments of UNESCO,” op. cit.

206 “U.S. and Israel Officially Leave UNESCO, Citing Anti-Israel Bias,” Haaretz, 2 January 2019, <https://www.haaretz.com/us-news/u-s-and-israel-officially-leave-unesco-citing-anti-israel-bias-1.6805062>; Daniel Marwecki, “Why Did the U.S. and Israel Leave UNESCO?,” E-International Relations, 14 February 2019, <https://www.e-ir.info/2019/02/14/why-did-the-u-s>



While the UNESCO General Conference resolutions therefore produce even less direct effect on Israel, they still play a role under international law and from a political perspective, determining the organization’s policies and main lines of work²⁰⁷ and giving insight into the UNESCO’s interpretation of applicable international law and thereby setting the bar in regard to international legal assessment of violations against cultural property in Jerusalem. Such a standard-setting statement was the Recommendation on International Principles Applicable to Archaeological Excavation which it adopted in 1956. It established international principles governing the protection and excavation of archeological sites, including a general prohibition on carrying out excavation in occupied territory, and was signed by Israel – however, it has no legally binding nature.²⁰⁸

The UNESCO General Conference issued its first resolution regarding Jerusalem in 1968, shortly after Israel’s illegal annexation of East Jerusalem, including the Old City. It condemned Israeli archeological activities in the Old City, however, at that time, the Old City of Jerusalem had not gained the status of World Heritage Site as per the convention, thus the resolution had merely symbolic effect and stated UNESCO’s approach towards the occupation and annexation.²⁰⁹ Since then, UNESCO has issued more than 20 resolutions concerning the cultural protection of Jerusalem and its holy places, all of which criticized Israel’s violations of its obligations under international law to protect heritage sites. Its most contentious resolution was adopted in October 2016, referring to Israeli activity and acts of violence committed as the occupying power against the Al-Aqsa Mosque compound, the Waqf administration and the Status Quo, and thereby confirming the international community’s stance on the status of Jerusalem and the provisions governing its cultural sites.

Parallel to the General Conference, the UNESCO Executive Board issues decisions during its regular sessions as well, with its latest one in April 2021, repeating Israel’s obligation to immediately halt the ongoing excavations, tunnel works and other projects in East Jerusalem, particularly in the Old City, and confirming their illegality under international law.²¹⁰ Those decisions are, again, binding towards the line of policy of the UNESCO itself, yet do not confer direct binding obligations upon Israel.

n. Under UN Security Council Resolutions

In contrast to the UNESCO’s standard-setting instruments, the United Nations Security Council (UNSC) can adopt legally binding resolutions as per Art. 25 UN Charter. In regard to cultural protection, set in Art. 39 of the UN Charter, the UNSC has issued Resolution 2347 in 2017, referring exclusively to the destruction of cultural heritage, including religious sites, during armed conflict and putting attacks on cultural property on a level with other threats to international peace and security.²¹¹ Although the resolution’s language itself does not confer many legally binding obligations and remains quite vague in many aspects and demands, and targets specifically but not exclusively terror organizations, it is still seen as an important step within international cultural heritage protection, as it extends to all situations of armed conflict due to its general phrasing, raising the international re-

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207 UNESCO, “Governance,” <https://en.unesco.org/about-us/governance>.

208 Ahmad A. Rjoob, Palestinian Ministry of Tourism and Antiquities, “The Impact of Israeli Occupation on the Conservation of Cultural Heritage Sites in the Occupied Palestinian Territories: The Case of ‘Salvage Excavations,’” *op. cit.*, p. 216; “Recommendation on International Principles Applicable to Archaeological Excavations,” UNESCO, 5 December 1956, http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html.

209 Katharina Galor, “From Destruction to Preservation,” *op. cit.*, p. 54.

210 UNESCO, “Decisions adopted by the Executive Board at its 211th session,” UNESDOC Digital Library, <https://unesdoc.unesco.org/ark:/48223/pf0000377290>.

211 UNESCO, “UN Security Council Highlights the Role of Cultural Heritage for Peace and Security,” 30 November 2017, <https://en.unesco.org/news/security-council-highlights-role-cultural-heritage-peace-and-security>; UNSC Resolution S/2017/969, 17 November 2017, <https://undocs.org/en/S/2017/969>.





quirements for protection.²¹² This also affects the situation in East Jerusalem, as the resolution, although not very substantial, binds Israel nonetheless.

For the case of East Jerusalem specifically, a couple of resolutions are relevant, although most of them reaffirm previous decisions. They include the following: UNSC Resolutions 252 of 1968 and 267 of 1969, which affirm the status of East Jerusalem as occupied territory, state that Israel's actions concerning East Jerusalem will not be able to change this status, and obligate Israel to halt all legislative and administrative measures that interfere with the current status of East Jerusalem, such as the expropriation of property, as well as to refrain from future actions, including thereby also all measures regarding cultural property. Due to the binding effect of UNSC resolutions, even if issued over 50 years ago, the mentioned obligations constitute binding international law upon Israel and concern cultural property in East Jerusalem whenever such property is violated in an attempt to alter Jerusalem's status under international law - especially means its status as an occupied territory, as a historic site of universal cultural importance and as the capital of a future Palestinian state.

The most recent UNSC Resolution 2334 refers again to the status of Jerusalem, reaffirming their position, and requesting Israel to comply with the laws of occupation in regard to East Jerusalem, thereby including the provisions relating to cultural heritage protection.²¹³

o. Under UN General Assembly Resolutions

The United Nations General Assembly (UNGA) has also issued numerous resolutions that relate to cultural protection specifically in East Jerusalem - although they again have no binding character and therefore are relevant to international law only indirectly, namely by having political impact but also by influencing the evolution of contemporary customary law.²¹⁴

UNGA Resolutions 2253 (ES-V) and 2254 (ES-V), adopted in 1967, consistent with the above mentioned UNSC resolutions, refer to the unchangeable status of East Jerusalem under international law. This includes again the obligation of Israel, to not interfere with cultural property if this poses a risk to Jerusalem's status as capital of a future Palestinian state. More recently, UNGA Resolution A/Res/72/15 of 2017, again criticized Israel's excavations in the Old City as well as its activities relating to the Al-Aqsa Mosque compound and other holy sites in East Jerusalem, affirmed that any alterations to the status of the holy city of Jerusalem are void, and requested Israel to respect the status quo of the holy places.

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ANNEX:

Ratification Status of Treaties Protecting Cultural Property (Table)

Legal framework	Ratification Israel	Ratification Palestine	Customary Law character	Binding effect on cultural heritage protection in EJ
1907 Hague Convention	✗	✓	✓	✓
1949 Geneva Convention	✓	✓	✓	✓
Protocol I	✗	✓	mostly	✓
Protocol II	✗	✓	mostly	✓
1954 Hague Convention for the Protection of Cultural Property	✓	✓	✓	✓
- Protocol I	✓	✓	✓	✓
- Protocol II (1999)	✗	✓	✓	✓
Status Quo	✗	✗	✓	✓
Art. 9 (2) of the 1994 Peace Treaty	✓	✗	✓	✓
Rome Statute	✗	✓	✗	✓
International Covenant on Economic, Social and Cultural Rights (ICESCR)	✓	✓		✓
International Covenant on Civil and Political Rights (ICCPR)	✓	✓		✓
Universal Declaration of Human Rights	✗	✗	disputed	disputed
UN Declaration on the Rights of Indigenous People	✗	✗	disputed	disputed
World Heritage Convention	✓	✓	✗	✓
1970 UNESCO Convention	✗	✓	✗	✗
1995 UNESCO Convention	✗	✗	✗	✗
2001 UNESCO Convention	✗	✓	✗	✗
2003 UNESCO Convention	✗	✓	✗	Influence on ICL
2005 UNESCO Convention	✗	✓	✗	✗





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