The Designation of West Bank Mosques as Israeli National Heritage Sites: Using the 1954 Hague Convention to Protect Against in Situ Cultural Appropriation

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THE DESIGNATION OF WEST BANK MOSQUES AS ISRAELI NATIONAL HERITAGE SITES: USING THE 1954 HAGUE CONVENTION TO PROTECT AGAINST IN SITU APPROPRIATION OF CULTURAL SITES

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ABSTRACT

This Article considers whether the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict\(^1\) (“1954 Hague Convention”) should extend to protect against *in situ* appropriation of culturally significant sites. This Article examines the text and spirit of the 1954 Hague Convention, and inquires whether the 1954 Hague Convention imposes an obligation on its Signing Parties to protect not just the physical integrity of culturally significant sites, but also the relationship of local peoples with those sites. This Article uses the recent dispute over the Ibrahimi and Bilal Bin Rabah Mosques (also called the Cave of Machpelah and Rachel’s Tomb, respectively) on the Palestinian West Bank as a lens through which to make this inquiry.

I. ISRAEL’S DESIGNATION OF WEST BANK MOSQUES AS NATIONAL HERITAGE SITES

Riots broke out on the West Bank after Israel announced on February 21, 2010, that it would name two mosques in the occupied Palestinian territory as Israeli national heritage sites. Israel's last minute decision to designate these shrines, including the Ibrahimi Mosque in Hebron (also called the Cave of Machpelah or the Cave of the Patriarchs) and Bilal Bin Rabah Mosque in Bethlehem (also called Rachel’s Tomb), was met with harsh criticism from a number of Palestinian and international organizations.

Judiasm and Islam agree that the Biblical and Qur’anic patriarchs Abraham, Isaac, and Jacob, as well as matriarchs Sarah, Rebekah, and Leah, are entombed in the cave complex beneath the Ibrahimi Mosque. Since the seventh century, the site has been used as a mosque, in

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5 UNESCO Decision, supra note 2.

6 This is described in more detail in Part II of this Article. See Tensions Escalate, supra note 4; Anna Willard, UNESCO Worried About Israel Heritage Plan in West Bank, REUTERS, Feb. 26, 2010, http://in.reuters.com/article/2010/02/26/idINIndia-46510020100226 [hereinafter UNESCO Worried].

7 UNESCO Worried, supra note 6. It is believed that the fourth Matriarch, Rachel, is buried in the Bilal Bin Rabah Mosque in Bethlehem (also called Rachel’s Tomb), now on the Israeli side of the West Bank barrier. West Bank Strike over Israeli Tomb Heritage Claim, BBC NEWS, Feb. 23, 2010, http://news.bbc.co.uk/2/hi/8530335.stm.
large part exclusively. It seized the site during the 1967 Arab-Israeli War, and it lay on disputed ground—occupied by Israeli military forces but home to Palestinians.

Darkening the cloud of the designation, Israel’s announcement was made on the eve of the sixteenth anniversary of a massacre at the Ibrahimi Mosque. On February 25, 1994, an Israeli-American settler infiltrated the mosque and opened fire on worshipping Muslims with an automatic rifle, leaving twenty-nine dead and 125 injured. More died in the riots that followed. Israel's designation of the Ibrahimi Mosque as an Israeli national heritage site so close to the anniversary of the massacre aggravated the Palestinian response.

Many Palestinians viewed Israel’s designation of the West Bank mosques as Israeli national heritage sites as an attempt to “hijack” Muslim holy sites located within occupied territory, going beyond mere military occupation and making a permanent claim to an area of great religious significance to Muslims. The President of the Palestinian Authority and

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9 Tensions Escalate, supra note 4.
12 An Israeli settler lives in one of the Israeli civilian communities in the Occupied Palestinian Territories, the largest of which is home to 30,000 people. The international community considers these communities tantamount to occupation and therefore a violation of international law. Macintyre, supra note 10.
14 On This Day, supra note 11.
15 Although Baruch Goldstein, the Ibrahimi Mosque gunman, is considered by many Israelis to have been insane, there has been a show of support for his actions since his death. This made the massacre a sensitive topic even before Israel’s heritage plan designation. See Joel Greenberg, Israel Destroys Shrine to Mosque Gunman, N.Y. TIMES, Dec. 30, 1999, http://www.nytimes.com/1999/12/30/world/israel-destroys-shrine-to-mosque-gunman.html (describing the Israeli Army’s bulldozing of the shrine built around Goldstein’s grave which had become a pilgrimage site, consisting of a stone plaza, benches, lights, a collection box, a prayer bookcase, and faucets).
Palestine Liberation Organization (“PLO”) leader, Mahmoud Abbas, immediately cautioned that the decision would exacerbate tensions and lead to renewed conflict. As Abbas predicted, riots followed Israel’s February 21, 2010, announcement.

II. THE INTERNATIONAL RESPONSE TO ISRAEL’S DESIGNATION

The international backlash to Israel’s designation was immediate. The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) issued a statement on February 26, 2010, stating it was concerned about Israel’s plan. The European Union’s (“EU’s”) foreign policy director stated Israel’s announcement was “detrimental to attempts to relaunch peace negotiations [with Palestine].” United States Secretary of State Hillary Clinton addressed a United States Congressional Committee and criticized the designation. Israel responded that

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17 Karmi, supra note 16.
the Cave of Machpelah (Ibrahim Mosque) is one of the most sacred sites for Jewish people and the designation “refers more to a line-budget to maintain the places.”

On October 12, 2010, UNESCO’s Executive Board addressed the conflict in session and issued a formal forty-four to one (twelve abstentions) decision, reaffirming that the two sites [the Ibrahim and Bilal Bin Rabah Mosques] are an integral part of the occupied Palestinian Territories and that any unilateral action by the Israeli authorities is to be considered a violation of international law, the UNESCO Conventions and the United Nations and Security Council resolutions.

The Board also advised Israel regarding a dispute over access to the Mughrabi Ascent site, stating, “No measures should be taken which will affect the authenticity and integrity of the site, in accordance with . . . the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict”.

Israel is a signatory to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("1954 Hague Convention"). Palestine is not a United

Nations member state,\textsuperscript{28} and it does not have general international recognition as an independent country,\textsuperscript{29} so it is not a signatory to the 1954 Hague Convention.\textsuperscript{30} Nonetheless, the United Nations has determined that international conventions to which Israel is a signatory apply to its occupation of Palestine.\textsuperscript{31} This includes the 1954 Hague Convention.\textsuperscript{32}

III. APPLICATION OF THE 1954 HAGUE CONVENTION

Following Israel’s addition of the West Bank mosques to the list of the country’s national heritage sites, the Palestinian Centre for Human Rights (“PCHR”) issued a statement that the designation violated the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict\textsuperscript{33} (“1954 Hague Convention”).\textsuperscript{34} Despite clear international


\textsuperscript{30} Signing Parties, supra note 27.


\textsuperscript{34} PCHR Condemns Israel’s Decision to Include the Ibrahimi Mosque and Bilal Ben Rabah Mosque on the List of Israeli Archaeological Sites, PALESTINIAN CENTRE FOR HUMAN RIGHTS (Feb. 22, 2010),
consternation over Israel's “provocation,” PCHR was alone in citing specifically to the 1954 Hague Convention.

PCHR pointed to Articles 1, 2, and 9 of the 1954 Hague Convention, which respectively define cultural property, call for the safeguarding of such property, and require restraint of hostility toward cultural property.

Article 1, *Definition of Cultural Property*, defines cultural property, which includes, “[m]ovable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest . . .” The Ibrahimi and Bilal Bin Rabah Mosques are immovable religious monuments and archaeological sites of great cultural importance and qualify as cultural property under the 1954 Hague Convention. This application is consistent with Israel’s stated reasons for wanting to name the monuments national heritage sites.

Article 2, *Protection of Cultural Property* provides, “For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for
such property.” Furthermore, Article 9 requires parties “ensure the immunity of cultural property . . . by refraining . . . from any act of hostility directed against such property.”\footnote{1954 Hague Convention, supra note 37, art. 9. It is worth noting that PCHR cited to the Second Protocol to the 1954 Hague Convention, which prohibits the transfer of cultural property in occupied territory, but Israel is not a Signing Party to this Protocol. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 212.} This Article parallels Article 4, \textit{Respect for Cultural Property}, which describes what constitutes “respect” in the context of the 1954 Hague Convention.\footnote{1954 Hague Convention, supra note 37, art.4.} Respect includes “refraining from any act of hostility” against cultural property located in the parties’ own territory or outside it.\footnote{Id.} Article 4 further requires parties to “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of . . . cultural property.”\footnote{Id.}

The 1954 Hague Convention is in large part focused on promoting physical preservation of culturally significant sites.\footnote{Id.} The Preamble “recogniz[es] that cultural property has suffered grave damage . . . [and] is in increasing danger of destruction.”\footnote{Id., preamble.} It further explains, “[D]amage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”\footnote{Id.} While the Preamble appears to acknowledge an inherent value to cultural sites, the 1954 Hague Convention’s focus on physical preservation is consistent with the property model of the Western legal system, where preservation of economic value is paramount, even if justified by cultural significance.

The designation of the historic West Bank mosques as Israeli national heritage sites does not work against physical preservation; in fact, Israel has allotted a significant amount of money
toward renovation of the sites.\textsuperscript{47} The sites are among 100 sites toward which Israel intends to invest $107 million for renovations.\textsuperscript{48} Israel further states the heritage plan will increase access because two hiking paths will connect all the sites—“one historical and the other centered on the Israeli experience.”\textsuperscript{49} Accordingly, both the Ibrahimi and Bilal Bin Rabah Mosques will become part of a physical circuit of cultural sites significant to the Jews.

While the 1954 Hague Convention clearly protects against physical damage or destruction to cultural sites, read broadly, it can also protect against \textit{in situ} appropriation of sites. “Hijacking”\textsuperscript{50} a religious site in occupied territory constitutes disrespect for the site when it disrupts or threatens the relationship between the site and the local people who identify with the site.

Like the Palestinians, Israelis have stated a strong belief in their own cultural ties to the sites.\textsuperscript{51} Israelis cite the Book of Genesis, which says Abraham purchased the Cave of Machpelah (Ibrahimi Mosque) for 400 shekels in order to bury his wife, Sarah, there.\textsuperscript{52} Abraham is a shared feature of Islam and Judaism, so this does not necessarily justify one group’s cultural interest in the site over the other’s interest.

Even so, the Muslims have been using the sites as mosques for over half a millennium.\textsuperscript{53} While the sites are significant in the religious doctrine of both Judaism and Islam, as to the Ibrahimi Mosque, only the Palestinians have “recent” history on their side. Their emotional ties

\textsuperscript{49} \textit{Netanyahu, supra} note 39.
\textsuperscript{51} \textit{Netanyahu, supra} note 39.
\textsuperscript{52} \textit{Genesis} 23:2-16.
to the site arise out of centuries of constant and near-exclusive use of the site as a place of worship.\textsuperscript{54}

Ghassan Khatib, head of the Palestinian government’s media office, has explained, “The issue is not whether these sites are Islamic or Jewish . . . . The point is that these are historic sites in occupied territory and Israel has no business controlling them.”\textsuperscript{55} Under this rationale, it does not matter which group has a more justifiable cultural interest in the sites; instead, the criticism is that Israel is using a cultural interest to justify and effectuate what others perceive as occupation or potential annexation.

The Israeli government maintains that it is because of its respect for these cultural sites that they should be included in the national heritage plan.\textsuperscript{56} Supporters of the plan have said it “strengthens the connection with land of our forefathers.”\textsuperscript{57} The Israeli left is skeptical, however; New Movement-Meretz leader Haim Oron has declared, “This is another attempt to blur the lines between the State of Israel and the occupied territories.”\textsuperscript{58} Hanan Ashrawl, member of the Palestine Liberation Organization’s executive committee, alleged that Israel was attempting “to recreate a fraudulent reality . . . where Palestinian history, culture, and identity are distorted and/or obliterated by the force of occupation.”\textsuperscript{59}

Israel has denied assertions that Palestinian access to the sites would be limited as part of

\textsuperscript{54} As to Rachel’s Tomb, the site is in the middle of a Muslim cemetery and has been used as a Mosque, but has been largely maintained by the Jews. In 1949, the United Nations considered the question of who owned the site and declared “status quo,” a legal option under Ottoman law akin to shared ownership. The Holy Places, UNITED NATIONS CONCILIATION COMMISSION FOR PALESTINE, U.N. Doc. A/AC.25/Com.Jer/W.14 (April 8, 1949) http://unispal.un.org/UNISPAL.NSF/0/FD455E412ACE30AD0525668E006EF702.
\textsuperscript{55} Karmi, supra note 51.
\textsuperscript{56} Chaim Levinson, Netanyahu: West Bank Sites Added to National Heritage List, HAARETZ, Feb. 21, 2010, http://www.haaretz.com/news/netanyahu-west-bank-sites-added-to-national-heritage-list-1.266037 (quoting the Prime Minister’s speech at the conference on the heritage sites, in which he explained, “[T]he country’s strength does not depend entirely on its military strength, weapons, economic power or ingenuity, but on the knowledge and national sentiments which parents pass down to their children, and as a state, on the education system.”).
\textsuperscript{57} Id.
\textsuperscript{59} Karmi, supra note 51.
the heritage designations, but the concerns appear justifiable. In 2005, Israel decided to extend their separation barrier to include the Bilal Bin Rabah Mosque (Rachel’s Tomb) in the Israeli side of the West Bank, effectively annexing the site. Further, PCHR has reported a recent pattern of restricted access to the Ibrahimi Mosque. PCHR alleges that on April 1, 2010, thousands of Israeli settlers held a “large celebration inside the Ibrahimi Mosque” for the heritage site designation. They further allege that the Israeli Defense Forces prevented the Muslim call to prayer in the Mosque on fifty-eight occasions in March 2010, and denied Palestinians access to the Mosque on three days. Whether the figures or details about any individual incident are precise as stated, the allegations indicate a disturbing pattern of conduct that forms the basis for Palestinian concerns about access to the mosques.

By laying a national claim to the sites, particularly the Ibrahimi Mosque, Israel is diminishing the Palestinians’ cultural interest in the property. If the 1954 Hague Convention is read broadly, consistent with the policy behind it, the designations constitute a failure to safeguard the cultural relationship of the occupied people with a culturally and religiously significant site. Unnecessarily interfering with an occupied peoples’ relationship with a cultural

60 Id. (The Israeli Prime Minister’s office issued a statement responding to the concerns, stating that “[t]he State of Israel is committed to freedom of religion for worshippers of all faiths at the holy places and thus it acts in practice.”).
61 The plans included bringing traditionally Arab east Jerusalem onto the Israeli side of the separation barrier, even though this was slated to be the capital for a future Palestinian state. Final Route of Jerusalem Barrier Approved, USA TODAY, Mar. 14, 2005, http://www.usatoday.com/news/world/2005-03-14-mideast_x.htm. Critics, including the European Union, believed Israel was “actively pursuing the illegal annexation.” Rory McCarthy, Israel Annexing East Jerusalem, Says EU, THE GUARDIAN, Mar. 7, 2009, http://www.guardian.co.uk/world/2009/mar/07/israel-palestine-eu-report-jerusalem. Given this history, it appears reasonable that Palestinians would be concerned about continued access to and possible annexation of the West Bank mosques.
63 Id.
64 Id.
site, when that site is otherwise under no specific or articulable danger of damage or destruction, undermines the 1954 Hague Convention and should constitute a violation of it.

IV. CONCLUSION

While the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict\(^65\) ("1954 Hague Convention") focuses in large part on preventing physical damage or destruction to cultural sites, the cultural sites derive much of their value from the emotional ties that people in local communities have with those sites. This cultural value is distinct from both economic and archaeological value. Safeguarding a cultural site includes preserving the physical integrity as well as the cultural value of the site. Cultural value depends upon allowing local people to maintain their relationships with cultural sites, even during occupation.

The spirit of the 1954 Hague Convention is consistent with recognition of cultural value—the intrinsic value of a cultural site that is borne of the relationship that local people have with such sites. The 1954 Hague Convention should be read broadly, conferring on its Signing Parties an obligation to safeguard and respect not only the physical integrity of cultural sites, but also cultural integrity. Interfering with a local people’s relationship with a cultural site decreases the cultural value of that site, interferes with the peoples’ right to self-determination, and is unjustifiable under the 1954 Hague Convention.

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