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**UNESCO, Religious Freedoms and World Cultural Heritage
in the Old City of Jerusalem: the line of fire between challenges,
comparisons and new perspectives ***

SUMMARY: 1. Introduction to the role of UNESCO in defining, respecting and implementing Human Rights and Fundamental Freedoms: a general analysis - 2. The right to participate freely in cultural life: the specific UNESCO's involvement in the field of religious rights - 3. IHL Dimension linked to UNESCO's Legislative Powers to Protect the Cultural Heritage in the Event of Armed Conflict or Occupation - 4. UNESCO's Actions to Preserve the Cultural Heritage in Syria and Iraq: A comparative framework - 5. The Legal Status of Jerusalem and the management of the Holy Places: Jerusalem in a Nutshell - 6. UNESCO's past interventions in Jerusalem: a legal basis for future interventions - 7. The Mughrabi Gate Ascent - 8. The 2008 Action Plan for the Safeguarding of the Cultural Heritage of the Old City of Jerusalem - 9. UNESCO, Resolution 200 EX/PX/DR.25.2: "Occupied Palestine" - 10. Conclusions.

1 - Introduction to the role of UNESCO in defining, respecting and implementing Human Rights and Fundamental Freedoms: a general analysis

The protection and promotion of human rights and fundamental freedoms is an intrinsic element of all UN Institutions. Still, the internalization of human rights instruments is an essential prerogative of those with the specific purpose to strengthen such international values. For what concerns the Educational, Scientific and Cultural Organisation (UNESCO), its declared purpose is to contribute to the promotion of human rights, fundamental freedoms and rule of law¹ through educational, scientific and

* Article peer evaluated.

¹ Several basic elements of the rule of law are set forth in the Universal Declaration as rights, such as the rights to life, liberty, and personal security, bans on slavery and torture, rights to legal recognition, equality before the law, and effective remedies for violation of fundamental rights, freedom from arbitrary arrest and detention, guarantees of fair criminal procedures, the presumption of innocence and the principle of non- retroactivity



cultural reforms. UNESCO is called upon to examine cases of violation of human rights which are individual and specific and question of massive, systematic or flagrant violations of human rights and fundamental freedoms, resulting either from a policy contrary to human rights, applied de jure or de facto by a state or from an accumulation of individual cases. They may be submitted under the procedure by teachers, artists, poets, authors, and other individuals whose rights to education², to share in scientific advancement³, to participate in cultural life, and to information, including freedom of expression⁴, have been violated.

2 - The right to participate freely in cultural life: the specific UNESCO's involvement in the field of religious rights

in criminal law, see **M.A. GLENDON**, *The Rule of Law in the Universal Declaration of Human Rights*, in *Northwestern Journal of International Human Rights*, Vol. 2, Issue 1, 2004, p. 5 ss.

² Art. 13 of the *International Covenant on Economic, Social and Cultural Rights and Optional Protocol*, New York, United Nations Office of Public Information, 1976; Art. 29 and Art 30, *Convention on the Right of the Child*; ED/2003/CONV/H/1; *Convention Against Discrimination in Education*, Paris, 14 December 1960; *Convention on Technical and Vocational Education*, UNESCO Paris, 10 November 1989; *World Conference on Education for All, Meeting Basic Learning Needs*, Jomtien, Thailand, 1990; Art. 1 of the *World Declaration on Education for All*, New York, Inter-Agency Commission (UNDP, UNESCO, UNICEF, World Bank) for the World Conference on Education for All, 1990; Office of the High Commission for Human Rights, CESCR General Comment No. 13, *The Right to Education (Art. 13)*, 8 December 1999 (contained in Document E/C.12/1999/10); **Y. DAUDET**, **K. SINGH**, *The Right to Education: An Analysis of UNESCO's Standard-setting Instruments*, in *Education and Policies Strategies 2*, Paris, 2001; **K. DIETER BEITER**, *The Protection of the Right to Education by International Law; Including a systematic analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*, in *International Studies in Human Rights*, Martinus Nijhoff Publishers, 2005.

³ "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits", see art. 27 of the *The Universal Declaration of Human Rights*, United Nations, New York, 1950; *The Right to enjoy the benefits of Scientific Progress and its Application*, UNESCO, Venice Meeting, 16/17 June 2009.

⁴ UNESCO's *Procedure for the Protection of Human Rights. The legislative history of the 104 EX. 3/3 Procedure*, UNESCO, in *unesdoc.unesco.org*, Paris, March 2009; Human rights can be protected if they are known and understood by people, as well as by professionals having special responsibilities in this field (lawyers, judges, police officers, etc.). Hence, the promotion of human rights became an essential part of UNESCO's activities, see **J. SYMONIDES**, "UNESCO's Contribution to the Progressive Development of Human Rights", in *Max Planck Yearbook of United Nations Law*, Vol. 5, The Netherlands, 2005, p. 330 ss.



The rights falling within UNESCO's range of powers are those mentioned in the Universal Declaration of Human Rights and in the United Nations Covenant on Economic, Social and Cultural Rights: namely, the right to education, science, culture and communication. The latter is identified as a fundamental right to participate freely in cultural life. Mainly, it concerns the process of cultural identification of human beings pertinent both to the individual sphere and the cultural life of the community. These rights may imply the exercise of other rights and fundamental freedoms, the most noteworthy are:

- *the right to information, including freedom of opinion and expression*; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers⁵;

- *the right to the protection of moral and material interests* resulting from any scientific, literary or artistic production⁶;

- *the right to freedom of peaceful assembly and association*, for the purposes of activities connected with education, science, culture and information⁷;

- *the right to freedom of thought, conscience and religion*; it shall be taken into account that guarantees for religious freedoms and respect for conscience and belief are inevitably found in the constitutional orders of liberal democratic societies and in international and regional human rights instruments⁸;

⁵ Art. 19 of the *International Covenant on Economic, Social and Cultural Rights and Optional Protocol*, United Nations Office of Public Information, New York, 1976; Art 9 of the *African Charter on Human and Peoples' Rights*; Art 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Art 13 of the *American Convention on Human Rights*.

⁶ Art. 27 of the *Universal Declaration of Human Rights*; **W.A. SCHABAS**: *"Human rights in education science and culture; legal developments and challenges"*, UNESCO/Ashgate Publishing, Paris, 2007, p. 273 ss.

⁷ **M.G. JOHNSON, J. SYMONIDES**, *The Universal Declaration of Human Rights: A History of its Creation and Implementation 1948-1998*, UNESCO Publishing, Paris, 1998.

⁸ The UNESCO Executive Board is of the view that all societies must comply with international standards, including freedom of expression and respect for religious and cultural beliefs and values. Any reaction, opinion or appreciation of this context must be expressed peacefully and constructively. The Institution also believes that the Freedom of Expression should be exercised with a deep sense of responsibility and must be founded on the principles of the Charter of the United Nations and the UNESCO Constitution, the Universal Declaration of Human Rights, the ICESCR, the ICCPR, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the Declaration of Principles on Tolerance. In the specific case, the publication of caricatures of the Prophet of Islam has caused deep and widespread offence and indignation within the Muslim



In this regard, there is a fundamental connection between the rights underpinning from the International Covenants and the powers of UNESCO in identifying, respecting and strengthening these fundamental rights and freedoms. As earlier consideration, religious freedom is primarily a matter of individual conscience, but it also implies, inter alia, the freedom to manifest publicly one's religion. With regard to the latter, UNESCO recognizes the unique role played by holy places, according them a peculiar and special legislative protection in time of occupation and armed conflict. To start the discussion, the International Covenant on Civil and Political Rights is the international key document for the protection of a vast array of human rights, including religious rights. Art. 18 of the ICCPR states that:

"I) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. II) No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice. III) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. IV) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions".

As stated by the Committee on Economic, Social and Cultural Rights⁹ on the right of everyone to take part in cultural life,

"the concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive

community around the world, see art. 18 of the *International Covenant on Economic, Social and Cultural Rights and Optional Protocol* and *Optional Protocol*, New York, United Nations Office of Public Information, 1976; Art 8 of the *African Charter on Human and Peoples' Rights*; Art 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

⁹ Cultural rights are considered an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world, see the UN Economic and Social Council, *E/C.12/GC/21, General Comment n. 21*, Paris, 21 December 2009.



process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity”.

Therefore, to speak of religious rights is to be understood as a resource enabling the cultural identification and development processes of individuals and communities.

As previously introduced, the ICCPR and ICESCR support the idea that religious freedoms can be based not only on the importance of protecting individual beliefs, but also on the importance of protecting the cultural and collective sphere to allow an effective exercise of such freedoms. UNESCO is then protecting the physical holy places and religious cultural heritage where such manifestation and development happen. According to this broader view, religion is an example of an all-encompassing right to culture, whose protection is of great value for the members of a cultural group, either because of its connection to the development of personality and because of its connection to individual and national identity. Hence, even more plausibly, when the holy sites of some religious group are harmed or destroyed or when believers are limited from visiting such sites or pray there, that constitutes a violation of the right to culture, hence it must be avoided to the extent of the most important international treaties. Holy places deserve a special protection because they play a crucial role in the life of religious cultures. Within the scope of UNESCO's powers for the preservation of religious and cultural heritage, the special protection of holy sites is not just dependent on the existence of a threat to religious practices: UNESCO has shown a general concern about the culture rather than a concern about the conscience of individual members. As a matter of fact, religious rights as extension of cultural rights and their manifestation are strictly dependent on the practices, representations, expressions, knowledge, skills, as well as the instruments, objects, artifacts and cultural spaces associated therewith, that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. They are transmitted from generation to generation, constantly recreated by communities and groups in response to their environment, their interaction with nature and their history. These cultural and religious practices provide the believers with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity¹⁰. Can the right to culture explain the special protection granted

¹⁰ Art. 2 of the *Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO, Paris, 17 October 2003.



to holy places? It is possible to answer this question with two differentiated considerations:

- with no doubt, the right to culture is reinforced and extended mainly to minorities and vulnerable groups, such as indigenous people or occupied population, both in peacetime or in the event of an armed conflict;
- this implies that insofar as religious freedom is converted in terms of protection of a cultural dimension, it is then understood in this framework as a measure aimed to guarantee the survival of minority or occupied populations. This position would imply that the holy sites of minority religions or occupied territories enjoy special protection.

Saying that the holy sites of the majority do not enjoy special protection under the right to culture is not like saying that they enjoy no protection at all. Members of majority religions would still be able to use all the regular legal and political tools to defend their interests in these sites. The fact is that their religious interests in general, and their interests in some sites in particular, do not enjoy extra protection if the political and cultural interests at stake in the holy sites are not contested¹¹.

Furthermore, the protection offered by UNESCO's legislative framework is grounded on the very existence of the holy place, regardless of a threat to the integrity of the holy places or limitations to the full exercise of religious freedom. The need of strengthened and targeted interventions is concerned with the possible disintegration of the minority culture or occupied population¹².

3 - IHL Dimension linked to UNESCO's Legislative Powers to Protect the Cultural Heritage in the Event of Armed Conflict or Occupation

First introduced in the previous paragraph, the safeguard of cultural rights and religious properties gets more tangled in time of war and military occupation. The Law of International Armed Conflicts (LOIAC) provide a special discipline, as it must be recognized that in time of conflict or belligerent occupation with a strong ethnic, cultural and religious character,

¹¹ G. SAPIR, D. STATMAN, *The Protection of Holy Places*, in *Law & Ethics of Human Rights*, 2016, pp. 135-155.

¹² C. JOHANNOT-GRADIS, *Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?*, in *International Review of the Red Cross*, 2015, p. 1253 ss.



the destruction of cultural heritage is an issue that usually reaches a great significance¹³.

The recent events in Iraq, the Project for the Rehabilitation of the Old City of Aleppo (1992) and the struggle for sovereignty over the Old City of Jerusalem are a clear example, on one hand, of the urgency of a special legal protection to avoid harms or destruction to world cultural heritage located in post-conflict, ancient or contested areas of the Middle East. On the other hand, some UN specialized agencies, such as UNESCO, have played a leading role of cultural restoration in post-conflict or ancient areas, such as Iraq and Syria, and may plausibly play a dispute resolution role in contested territories, such as Jerusalem¹⁴. A body of legislation contemplates the protection of the above mentioned religious and cultural rights, holy sites and archaeological activities. The LOIAC recognizes that, in “extraordinary situations”, the civil population is unprotected and endangered not only physically but also in terms of their cultural identity: the eradication of cultural heritage often becomes a sensitive topic.

For what concerns the protection of cultural heritage in time of armed conflict and occupation, the LOIAC has provided three main principles of conduct of hostilities: - prevention against all threats stemming from armed conflicts; - principle of distinction between, respectively, civilian/cultural property and cultural property/heritage;

- relative proportionality related to the calculation of incidental damages¹⁵. This is particularly necessary in the case of armed conflict and occupation where tangible and intangible heritage are inevitably at risk. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two (1954 and 1999) Protocols¹⁶, the 1874

¹³ **R. KOLB, R. HYDE**, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, Oxford, 2009, p. 230; The term occupation is used in several branches of international law, but the belligerent occupation has unique features, such as the hostility and the inter-State war (bellum), see **Y. DINSTEIN**, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 31; **E. BENEVISTI**, *The International Law of Occupation*, Oxford University Press, Oxford, 2012.

¹⁴ **C. LARKIN, M. DUMPER**, *UNESCO and Jerusalem: Constraints, Challenges and Opportunities*, in *Jerusalem Quarterly*, Vol. 2009, 2009, p. 16 ss., and *The Politics of Heritage and the Limitations of International Agency in Contested Cities: a Study of the Role of UNESCO in Jerusalem's Old City*, in *Review of International Studies*, Vol. 38, 2012, p. 25 ss.

¹⁵ **N. LUBELL**, *Human Rights Obligations in military Occupation*, in *International Review of the Red Cross*, Vol. 94, Spring 2012.

¹⁶ *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (entered into force 7 August 1956) and its two (1954 and 1999) Protocols*, UNESCO, 1954, deal with the protection of cultural property in the event of military occupation. Art. 4.3 of



International Declaration concerning the Laws and Customs of War¹⁷, the 1880 Laws of War on Land¹⁸, the Convention II with Respect to the Laws and Customs of War on Land¹⁹ and the 1907 Hague Convention respecting the Laws and Customs of War on Land²⁰ are the background rules whose aim is the preservation of cultural heritage of the land. The purpose of the Covenants is to demonstrate that cultural heritage continues to enjoy legal protection in all phases of an armed conflict or occupation, regardless of its character. Indeed, it is not possible to deny the existence, since time immemorial, of customary norms under which belligerents are required to spare cultural heritage in such situations²¹. Damages to cultural heritage²²

the 1954 Hague Convention is concerned with act of vandalism, theft, pillage and misappropriation of cultural property: although it applies after the outbreak of hostilities and therefore falls outside the scope of safeguarding measures of Art. 3 of the same Convention, it can be interpreted as preventive in nature. It pushes State Parties a) to prohibit this type of behavior by military order; b) to put a stop to it by disciplinary measures; c) to prevent irreparable damages to cultural heritage. The Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999 (entered into force 9 March 2004) incorporates more recent developments in the law of armed conflict, such as those relating to the conduct of hostilities, into the system for protecting cultural property.

¹⁷ The legislative instrument prohibits military actions against “institutions dedicated to religion”, see *the International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874*.

¹⁸ Belligerent parties are required to save buildings dedicated to religion, art or science, see *the Laws of War on Land, Manual published by the Institute of International Law, Oxford Manual, Adopted by the Institute of International Law at Oxford, September 9, 1880*.

¹⁹ “In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants”, see art. 27 of the *Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War and Land, The Hague, 29 July 1899*.

²⁰ “In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand”, see art. 27 of the *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907*.

²¹ **R. O'KEEFE, C. PE'RON, T. MUSAYEV, G. FERRARI**, *Protection of Cultural Property. Military Manuals*, UNESCO Publishing, Paris, 2016.

²² The first type of harm is “destruction”. The second type of harm is referred to as



may occur not only during active hostilities, but also when the property has fallen in the enemy forces' control. This is the case of military occupation and non-international armed conflict. Such harm usually results from violations of the enemy troops obligations to ensure the protection of both the people and the property that results into their power. More precisely, if the occupation is long-lasting, it may involve profound changes to the economic and social fabric of the concerned occupied population and may be liable to undermine the cultural identity of individuals.

Simultaneously, the law which protects such heritage is not limited to the Law of Armed Conflict. Cultural property also benefits from the protection of other applicable instruments, such as the UNESCO Cultural Heritage Conventions. The 1972 World Heritage Convention²³ and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage²⁴ are a noteworthy example of such a purpose. They have gained a privileged position because they serve as the most appropriate legislative structure underlying the protection of cultural heritage both in peacetime and in armed conflict and occupation. The items protected by the Conventions are

“change of function”: the conversion of the Babylon archaeological site into a military base during the 2003 Iraqi conflict, decided on by US forces, is an example of this category. “Removal”, “pillage”, “theft”, “misappropriation of cultural property”, “vandalism” and “requisitioning movable cultural property situated in the territory of another High Contracting Party” are also considered as harm to cultural property, see the *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (entered into force 7 August 1956) and its two (1954 and 1999) Protocols*, UNESCO, 1954; G. PETTINATO, *Mitologia Sumerica*, UTET, Torino, 2001.

²³ One of the convention's major innovation is the creation of a World Heritage Committee, which is responsible for its correct interpretation, application and implementation. It also determines the concept of “outstanding universal value” as cultural and/or natural significance, which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. As such, the permanent protection of this heritage is of the highest importance to the international community as a whole. “Cultural property” is referred to as all property of great importance to a particular state’s cultural heritage. Examples of the sorts of property that can be considered cultural property are provided in article 1 of the Convention. They include both immovable cultural property, meaning buildings and other monuments of historic, artistic or architectural significance, as well as archaeological sites, and movable cultural property, by which is meant works of art (such as paintings, drawings, sculptures and so on), antiquities, manuscripts and books, whether individually or in collections, as well as archives, see art. 1 of *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (entered into force 7 August 1956)*, UNESCO, 1954.

²⁴ *Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO, Paris, 17 October 2003.



those pertaining to the cultural or natural heritage, which are listed as world cultural property from the point of view of history, religion, art, science, aesthetics, anthropology or ethnology. Each State Party to the Convention recognizes the duty of ensuring conservation of elements of the world heritage situated in its territory and undertakes to act to this end. However, the concept of cultural heritage of outstanding universal value is not restricted to the only sites, which are inscribed on the World Heritage List or the Tentative List. Article 12 of the WHC states that the fact that a property has not been included in either of the lists mentioned shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusions in these lists²⁵.

Indeed, in the contest of an armed conflict, UNESCO recommends the international community as a whole to respect the obligation to recognize the concerned world heritage as a common interest involving the cooperation of the States Party. Accordingly, States Party must deliberately refrain from undertaking acts, which might damage directly or indirectly the integrity of the natural and cultural heritage. Additionally, all the other Contracting States recognize that it is the duty of the international community to cooperate in ensuring the conservation of a heritage, which is of universal character²⁶. Most notably, the 1972 WHC could assume a predominant role in prosecuting those responsible for war crimes against cultural heritage. It could primarily act as the common legal denominator to protect the cultural heritage of a country on occasion when, such as the Syrian Conflict or the Iraqi occupation, the Government is to investigate

²⁵ See Art. 12 of the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO, Paris, 1972.

²⁶ “1) Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate. 2) The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request. 3) Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention. For the purpose of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage”, see Art. 6 of the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO, Paris, 1972.



violations both of the 1954 Hague Convention and the WHC. Indeed, the 1954 Hague Convention, the 1972 WHC and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage constitute a framework whose applicability can be invoked in the event of an armed conflict and occupation. This statement is supported by the International Criminal Court in *Al-Mahdi Case*. The ICC indicted Al Mahdi on several charges of war crimes, for intentional attacks against ten religious and historic buildings and monuments. All the buildings had been under UNESCO protection and most of them had been listed as world heritage sites. This statement is particularly meaningful because the ICC strengthens the link between cultural-religious property and cultural identities, while conferring solemnity to the WHC and UNESCO's efforts in protecting those places²⁷.

In order to analyse the potential role of UNESCO as a guardian of cultural heritage and as a dispute resolution institution, it is now necessary to examine its comparative conservation and restoration experiences in respectively post-conflicts areas and ancient areas, such as Iraq and Syria.

4 - UNESCO's Actions to Preserve the Cultural Heritage in Syria and Iraq: A comparative framework

As briefly introduced earlier, the Middle East has often been called the "Cradle of Civilization" and is home to countless sites of cultural, historic and religious importance. Over the centuries, this area has also been a focal point for religious-ethnic based conflicts. This uninterrupted clash between cultures has culminated in a precarious position for many historic sites throughout Syria, Iraq and the Old City of Jerusalem, as current conflicts threaten their protected status. UNESCO's role in safeguarding post-conflict areas' cultural heritage is long-standing. The World Heritage Committee has focused on implementing activities that range from urgent safeguarding actions to technical assistance for ensuring the sustainable management of cultural treasures under threat²⁸.

One of the two most emblematic post-conflicts areas is Iraq, which currently has four sites inscribed on the World Heritage List: Hatra, the

²⁷ *Situation in the Republic of Mali in the Case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, app. no. ICC-01/12-01/15, ICC (Public Reparation Order), 17 August 2017.

²⁸ **Q.H. RASHED**, *The Importance of Cultural Heritage in Iraq*, in *World Heritage Review*, UNESCO Publishing, June 2015.



Ancient City of Ashur, Samarra Archaeological City, Erbil Citadel. Called Mesopotamia by the Greeks and Sumer, Akkad, Babylonia, and Assyria by its own ancient inhabitants, Iraq has an excellent claim to be the origin of the Western cultures. Among the many achievements attributed to these ancient civilizations are the wheel, writing, agricultural irrigation, the first code of written laws, significant trade, and the development of complex communities. Scholars believe that Iraq's cultural heritage is the modern world's cultural heritage: its complex past captured the interest of archaeologists and historians. Farther, its cultural richness provoked an urgent pressure to protect Iraq's antiquities from the devastation posed by 2003 United States' Occupation of Iraq²⁹. Indeed, in the aftermath of the 2003 Iraqi occupation, and as a result of the destruction and illicit trafficking of Iraq's cultural heritage, UNESCO has played a crucial role in addressing emergency needs³⁰. In this specific circumstance, the coalition between the UN Security Council, UNESCO and the Iraqi Institutions led to the adoption and implementation of Resolution 1483. Its fundamental aim is the enactment by all Member States of appropriate measures to facilitate the safe return to Iraqi Authorities of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance illegally removed from the Iraq National Museum, the National Library and other locations in Iraq³¹.

The assistance provided by UNESCO in the implementation of this mutual Decision further consolidated its role within the field of cultural rights. At first, the organization developed plans for taking inventories, undertaking the emergency conservation of objects, and providing equipment and supplies to the National Department of Antiquities for the restoration of the sites inscribed in the WHL. Secondly, it warmly recommended the adoption of a cultural policy based on the values of diversity and pluralism, which allows Iraq to maximize its chances of reconciling past, present and future, and take a decisive step towards

²⁹ The international antiquities community responded with a sense of urgency about the extent of the looting at the National Museum, see **L.E. WILLIS**, *Looting in Ancient Mesopotamia: A legislation Scheme for the Protection of Iraq's Cultural Heritage*, in *GA. Journal of International Law & Comparative Law*, Vol. 34, 2005, p. 277 ss.

³⁰ **V. NEGRI**, *UN Security Council: how international frameworks can help to protect Iraq's heritage*, in *World Heritage Review*, UNESCO Publishing, June 2015; **H.G. HE**, *Protecting Ancient Heritage in Armed Conflict: New Rules for Targeting Cultural Property During Conflict with ISIS*, in *Maryland Journal of International Law*, Vol. 30, 2015, Issue 1, Article no. 12.

³¹ **G. PETTINATO**, *Mitologia Sumerica*, cit.; see UN S/ RES/ 1483 (2003) and RES/661 (1990).



reconstruction after the conflict. UNESCO treats the protection of cultural rights as a matter of urgency, on equal footing with humanitarian aid, sanitation and education. Hence, it suggests the Iraqi National Authorities to consider them as primary human rights. Indeed, the Iraqi Government was well aware of the massive damages suffered to its cultural heritage as a result of the United States' invasion and the subsequent looting of the National Museum in Baghdad. Finally, in response to UNESCO's efforts, the Government re-enacted the previous legislation protecting the cultural property³². Following the precursory legal framework, Iraq declared that all cultural property belonged to the State and all artifacts were nationalized. Though the previous domestic legislation and policies are drawn from the cultural nationalist ideology, UNESCO suggests to enact policies reflecting the theory of cultural internationalism. This compromise will plausibly increase the protection of Iraqi cultural heritage: while the distribution of some Iraqi artifacts to nations around the world would facilitate promoting the importance of Iraqi patrimony, it would also help to gather international support for the preservation of Iraq's cultural heritage, preventing it from illegal trade.

The comparative framework continues with the UNESCO project of Conservation and Restoration of the Ancient Citadel of Aleppo, registered as a World Heritage Site in 1986. The Syrian Arab Republic has witnessed the rise and fall of several civilizations, among them the Hittites, Assyrians, Arabs, Mongols, Mamelukes, Arameans, Phoenicians, and Romans, all of which left their imprint on its territory creating a cultural richness that is nowadays referred to as "an open air museum", directly exposed to the risks of damage and devastation deriving from an armed conflict³³. This definition mainly fits to the Citadel of Aleppo, which is located at the crossroad of several trade routes: an incredible amount of suqs, hammam, madrasas, mosques, evidences of past occupations, remains of religious

³² Antiquities Law, no. 59, art. 3/1936, Iraq, amended by Law no. 120/1974, Iraq, and Law no. 164, 1975, Iraq. This legislation embodies a culturally nationalistic framework, enabling the state to claim ownership of all national artifacts. Iraq also a State Party to the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*. Law n. 55 for the Antiquities and Heritage of Iraq (2002) increased criminal sanctions regarding illicit trading and trafficking in antiquities.

³³ **M. LOSTAL**, *International Cultural Heritage Law in Armed Conflict; Case-Studies of Syria, Lybia, Mali, the Invasion of Iraq, and the Buddhas of Bamyian*, Cambridge University Press, Cambridge, 2017, and *Syria's World Cultural Heritage and Individual Criminal Responsibility*, in *International Review of Law*, 2015; **N.A. MUNAWAR**, *Rebuilding Aleppo: Public Engagement in Post-Conflict Reconstruction, a contemporary provocation: reconstructions as tools of future-making*, ICOMOS, March 2017.



properties and monumental buildings contributes to the creation of its outstanding value. The property is protected by the Syrian Antiquities Law³⁴ and by several International Covenants, such as the 1972 World Heritage Convention, the 1970 Convention on Illicit Trafficking of Cultural Property³⁵ and the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict. The 1992 Project for the Rehabilitation of Old Aleppo is with no doubt noteworthy in terms of conservation, restoration repair and cooperation with the National Authorities³⁶. It was set up under the Municipality of Aleppo in cooperation with UNESCO World Heritage Committee. In 1999, the Directorate of the Old Citadel of Aleppo was established under the Municipality of Aleppo to guide the rehabilitation of the old city with three departments covering: - studies and planning; - permits and monitoring; - implementation and maintenance.

A comprehensive plan for the evolution of the city is being prepared by the Old City Directorate office. The city's development is being considered under the "Program for Sustainable Urban Development in Syria" (UDP), a joint undertaking between international agencies, the Syrian Ministry for Local Administration and Environment, and several other Syrian partner institutions. The overall strategy is responding to the needs of:

- facing the damages caused to the historical urban area, following the introduction of a modern urban trend within the Old City: the historic fabric seemed to be threatened according to the growing need of a modern lifestyle;

³⁴ Law no. 222 (*Syrian Antiquities Law*), 26 October 1963.

³⁵ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*, UNESCO, Paris, 1970.

³⁶ Islamic, Christian, Kurdish and Jewish heritage, is being intentionally destroyed or attacked in what is clearly a form of cultural cleansing". There has been an attempt to get media coverage, recruit new members and find antiquities to be sold on the black market, allowing the so-called Islamic State of Iraq and Syria (ISIS) to pursue an escalating campaign of cultural devastation. ISIS has intentionally targeted historical monuments (such as the Assyrian Green Church in Tikrit and Jonah's Tomb in Mosul), archaeological remains (such as the ancient cities of Nimrod and Hatra), and works of art (for example, several rare manuscripts from the Mosul Library and two original items, the Winged Bull and the God of Rozhan, from the Mosul Museum) which it perceives as blasphemous and contrary to the tenets of its radical faith, see **A. FRIGERIO**, *Considerations on the Legitimacy of Organizing a Humanitarian Intervention Aimed at Stopping the Intentional Destruction of Cultural Heritage*, in *Santander Art and Culture Law Review*, 2/2015, p. 101 ss.



- recovering the social split and lack of coherence produced by the introduction of the new trends within the Old City of Aleppo: the new modern buildings were affordable only for medium or high income class citizens;
- creating an homogeneous framework of living standards in the courtyard homes and historical neighbourhoods, that in most cases resulted abandoned, isolated, affected by structural decay and victims of economic devaluation;
- upgrading public and private services through the adoption of proper planning and building regulations, allowing a sustainable urban management and development project at the national and municipal level;
- introducing regulatory rules for heights and density of new developments in specific neighborhoods, and policies for the protection of archaeological remains uncovered during infrastructure and development works.

In other words, the aim is to preserve the valuable and unique cultural peculiarity of the Old City, to slow down the deterioration of its residential areas, promoting economic and social development, while preserving the housing and improving living conditions. Though the complexity of the project, Aleppo represents an excellent example of shared efforts and resources between UNESCO, the municipal and national institutions and third states. The concerned Institutions showed awareness, in the fields of their respective competences, of the need to foster traditional approaches to conservation, restoration, repair and maintenance of historic urban fabric and characteristic architectural urban features³⁷. Furthermore, the Old Citadel is not just a precious ancient or cultural heritage symbol, but, most notably, is a place where cultural rights are expressed through its

³⁷ The project is articulated into four main phases: Phase 0: (1992-1994) Preparation and surveys: Detailed surveys were conducted to evaluate the existing conditions in the Old City and to identify priority intervention areas. Phase I: (1994-1997) Planning and pilot projects: General comprehensive planning was used to incorporate all aspects of urban management (land use, housing, traffic, infrastructure, social services, monument preservation, and public participation). Early programs were initiated in the form of micro-credit loans to assist lower income families in the urgent restoration of their homes. Phase II: (1997-2000) Establishing institution and procedures: first implementation phase. The micro-credit system was widened to incorporate complex house restoration and architectural preservation. The intensive and comprehensive work program necessitated the establishment of a more permanent institutional structure: The Directorate of the Old City. Phase III: (2001-2004) Developing sustainable management and financing tools: second implementation and consolidation phase. New funding schemes are being tested to encourage environmentally friendly enterprises. Infrastructure maintenance is programmed to insure efficient management, see *Ancient City of Aleppo Project*, UNESCO, 1992-2004.



historical and cultural remains. The conservation experiences undertaken by UNESCO in Iraq and Syria shall be taken as an example. The legislative feasibility and efficiency of those interventions is very plausibly going to represent the theoretical foundation of the Organization's conciliation role. Indeed, when human, social and economic resources are shared among the concerned parties, cultural rights enjoy a wider exercise, both from the point of view of safeguarding the world heritage sites and from the perspective of the people identifying their cultural roots on such places. On the one hand, the Iraqi Case study represents the transposition in its domestic system of a series of international rules finalized to the protection of its world cultural heritage: the reception is the result of UNESCO's long-term intervention and process of legislative consciousness, coordinated with the Iraqi Institutions. On the other hand, the 1992 Aleppo experience illustrates the efficiency of UNESCO's plan in reconciling the exigencies of preservation of ancient sites with the need of progress in a typical Middle-Eastern context.

5 - The Legal Status of Jerusalem and the management of the Holy Places: Jerusalem in a Nutshell

The territory of Israel and the Palestinian Territory are known as "Holy Land"³⁸. The holiness attributed to this geographical area by billions of

³⁸ The term relates to Israel and Palestine. Throughout the world, there are cities, countries and geographic regions that are defined as "holy" and granted special judicial status. For example, the cities of Mecca and Medina in Saudi Arabia are defined as "holy cities," and the Vatican is a separate state, see **A.E. MACK**, *Selectively Sacred: Holy Sites in Jerusalem and its Environs*, Emek Shaveh, April 2016; The approach of the Ramban (Rabbi Moshe ben Nachman, or Nachmanides) states that the "holiness of the place is binding". This approach was adopted by Rabbi Abraham Isaac Hacoen Kook, the first chief rabbi of Israel. He influenced religious Zionism during the 20th Century and it probably transformed this approach into a dominant theme in modern Israeli discourse. According to Muslim belief, this dedication is considered to be a charitable act that entitles the donor to eternal rewards in the world to come. Since rewards are eternal, the sanctity of the property is considered to be eternal as well, and it is therefore forbidden to damage the property or transfer it to a different owner. Christianity attributes supreme significance to three sacred sites: the Church of the Nativity in Bethlehem, the Church of the Holy Sepulcher in Jerusalem and Mary's Tomb in Jerusalem. Many other places in Israel and the Palestinian Authority are also considered holy, because Jesus' presence at these locations represents "evidence" of his acts. The official position of the Catholic Church is that locations protected by law, such as those on the "status quo" list, are sacred sites and their status must not be changed, see **S. FERRARI, A. BENZO**, *Between Cultural Diversity and*



believers around the world has an effect on the Israeli-Palestinian conflict and attracts considerable international involvement. Jerusalem represents the core of the conflict, to which is granted a special legislative status as an administered area.

What is more, the sanctity and the struggle for sovereignty over Jerusalem is shared and contested among the three biggest monotheist religions. During the years, the Old city of Jerusalem had been hosting some of the most ancient religious and cultural identities: under the Ottoman rule (1517-1919) and the British Mandate (1919-1948), the Christian and the Jewish population in Jerusalem enjoyed a level of religious tolerance. The city, contained in ancient walls, was home to thousands of Jews, Christians, Armenians and Muslims and it was divided into quarters, split between the four cultural identities. When the British mandate ended in 1948³⁹, the Jews kept their position in the western side of Jerusalem but lost the eastern side of Jerusalem, including the entire Old City. The cease-fire or armistice lines drawn in 1949 divided Jerusalem. All the Christians and Muslims living in Eastern Jerusalem fell under the leadership and supervision of Jordan.

Despite the provisions of the Armistice agreement were signed and agreed between Israel and Jordan, the Jewish people lost access to the Old

Common Heritage: Legal and Religious Perspectives on the Sacred Places of the Mediterranean, Routledge, 2016.

³⁹ **V. KATTAN**, *From Coexistence to Conquest; International Law and the Origins of the Arab-Israeli conflict 1891-1949*, Pluto Press, London-New York, 2009; The Committee has published the list of the 97 holy places in Israel: the Basilica of the Holy Sepulchre and its dependencies (Jerusalem), the Deir al Sultan (Jerusalem), the Sanctuary of the Ascension (Jerusalem), the Tomb of the Virgin (Jerusalem), the Basilica of the Nativity (Bethlehem), the Grotto of the Milk (Bethlehem), the Field of the Shepherds (Bethlehem), the Wailing Wall (Jerusalem), the Rachel's Tomb (Bethlehem), [...]. It recognized the persistence of the status quo to the holy places: the status quo is the perpetuation of arrangements approved by the Ottoman Decree of 1757 concerning rights, privileges and practices in certain Holy Places to which conflicting claims had been put forward. The conflicting claims related to disputes between religious faiths concerning a Holy Place (Rachel's Tomb, the ownership of which has been claimed by both Jews and Muslims) and disputes between branches of religious faiths (Cf. the Basilica of the Holy Sepulchre, where rights and claims have been contested by the Latin, Greek Orthodox, Armenian, Coptic and Syrian Jacobite Churches). In the main the disputes concerned: a) questions of ownership and matters devolving therefrom, such as the right to carry out repair work or alterations; b) questions relating to the right to hold religious services. The status quo may be said to be "frozen" with respect to the situation regulated in 1757, see A/AC.25/Com. Jer/W.14, *UN Conciliation Committee for Palestine*, 8 April 1949; **R. LAPIDOTH, O. AHIMER**, *Freedom of Religion in Jerusalem*, The Jerusalem Institute for Israel Studies, Jerusalem, 1999; **Y. REITER, Y. BE'ER**, *Dangerous Liaison: The dynamic of the Rise of the Temple Movements and their implications*, Ir Amim, 1 March 2013.



City and the Temple Mount⁴⁰. After the Six Days war in 1967, the Israeli military regained control of Jerusalem and reunited the Holy City: the State of Israel enforced its rule and law on East Jerusalem, unifying the two parts of the city. In the spirit of religious freedom and tolerance, Israel granted the Islamic religious authorities jurisdiction over Judaism's holiest site: the Temple Mount. Under the supervision of the Islamic authorities, the Temple Mount is the place in Jerusalem where it is illegal for Jews or Christians to openly pray.

After the occupation of the West Bank in 1967, Israel applied its law on East Jerusalem, including the legislation on the Protection of holy places⁴¹. This law does not define what a holy place is, and does not specify a list of holy sites. Only in 1981, the Knesset enacted a Basic Law, that includes in its Regulation a list of the Jewish holy places: the Western Wall and its Plaza, including every building and above ground or underground passage entrance from the Plaza area, Cave of Simon the Just, Cave of the Small Sanhedrin, Tomb of Rabbi Ovadiah of Bartenura, Tomb of Zachariah the Prophet and Absalom's Tomb⁴². Furthermore this law declares *Jerusalem, complete and united, the capital of Israel*⁴³. Israel's High Court of Justice has ruled that Israeli rule over East Jerusalem has been legally enforced:

⁴⁰ The Jewish tradition holds that it is the site where God gathered the dust to create Adam and where Abraham nearly sacrificed his son Isaac to prove his faith. King Solomon, according to the Bible, built the First Temple of the Jews on this mountaintop circa 1000 B.C., only to have it torn down 400 years later by troops commanded by the Babylonian king Nebuchadnezzar. In the first century B.C., Herod expanded and refurbished a Second Temple built by Jews who had returned after their banishment. It is here that, according to the Gospel of John, Jesus Christ lashed out against the money changers (and was later crucified a few hundred yards away). The Roman general Titus exacted revenge against Jewish rebels, sacking and burning the Temple in A.D. 70. Among Muslims, the Temple Mount is called Haram al-Sharif (the Noble Sanctuary). They believe it was here that the Prophet Muhammad ascended to the "Divine Presence" on the back of a winged horse, the Miraculous Night Journey, commemorated by one of Islam's architectural triumphs, the Dome of the Rock shrine. It is controlled by the Waqf Muslim authority. Today the Temple Mount, a walled compound within the Old City of Jerusalem, is the site of two structures: the Dome of the Rock to the north and the Al-Aqsa Al-Sharif Mosque to the south, see **Y. REITER**, *From Jerusalem to Mecca and back; the Islamic consolidation of Jerusalem*, The Jerusalem Institute for Israel Studies, Jerusalem, 2005.

⁴¹ Protection of Holy Places Law 5727, Israel, 1967.

⁴² Regulation for the Protection of Holy Places for Jews, Israel, 1981.

⁴³ **S. BERKOVITZ**, *The Temple Mount and the Western Wall in Israeli Law*, The Jerusalem Institute for Israel Studies, Jerusalem, 2001, p.16 ss.



“Accordingly, a ruling has been passed that the area of the Temple Mount is part of the area of the State of Israel. [...] This principle being expressed in Basic Law: Jerusalem, the Capital of Israel [...]. The sovereignty of Israel over unified Jerusalem in general, and over the Temple Mount in particular, implies that all the laws of the state [...] are effective on the Temple Mount, and every person's right to freedom of worship, freedom of access in the Holy Places and to protection from sacrilege thereof is effective also on the Temple Mount⁴⁴”.

Consequently, after Jerusalem had been declared the capital of Israel in 1967 and repeatedly in 1980 through the Israeli Basic Law, the issue of Temple Mount became paramount, since it's a place that's holy both to Muslims and Jews⁴⁵. This attempt to change the legal status of Jerusalem, has been deemed “*invalid, null and void*” by the Security Council and the General Assembly. It has been perceived as a serious breach of international laws prohibiting the annexation of the occupied territories. Furthermore, The Security Council declared on 1980 that East Jerusalem is an “*administered area*”⁴⁶.

The paradox of the management of the Holy Places located in Jerusalem represents with no doubt the core of the Israeli-Palestinian conflict. It is partially an unresolved problem of legal nature: the different interpretations the Parties give to the applicable international law threaten the possibility of reaching a permanent agreement on the crucial issues that foment the conflict. On the other side, the dispute assumes mainly a symbolic meaning, as two different cultural contexts, Israeli and Palestinian, have established their roots and claim rights in such a specific holy site. There is broad consent within International and UN Institutions and Agencies that the Status Quo of the Temple Mount has been undermined: the Israeli government, which exercised effective degrees of legal, military, and economic control over the Occupied Territories, restricted, from time to time, Palestinian access to religious sites, including the Haram al-Sharif/Temple Mount and the Church of the Holy Sepulchre.

⁴⁴ *Temple Mount Faithful Association vs. Attorney General, Piskei Din*, app. no. 4185/90, ICJ, pp. 221, 280-281.

⁴⁵ UNESCO recognizes the importance of the Old City of Jerusalem and its Walls for the three monotheistic religions, see 200 EX/PX/DR.25.2, “*Occupied Palestine*”, UNESCO, EXECUTIVE BOARD TWO HUNDREDTH SESSION, Rev. PARIS, 12 October 2016.

⁴⁶ A/Res/2253; A/Res/ 2254; S/Res/252; S/Res/271; S/Res/298; S/Res/478; S/Res/465; S/Res/476; A/Res/35/169; A/Res/35/ 122;



In fact, Israel is in possession of the keys to the Mughrabi Gate⁴⁷ and advances tourism-nationalist religious works and projects in the area surrounding the Temple Mount. While Israel limits the freedom of worship for Jews there, it also restricts access and freedom of worship for Muslims through security measures. Israel maintains control over the security around and inside the Temple Mount compound, and imposes age limitations on entry based on security forces directives.

Actually, the Palestinian position is that each of these places would come under their sovereignty, while the Jewish Quarter of the Old City and the Wailing Wall would come under Israeli authority (rather than sovereignty). Thus, one of the central obstacles toward a permanent Israeli-Palestinian dispute settlement is the status, of holy and archaeological sites in Jerusalem and their management⁴⁸. In this specific case, the Holy Land is a special area of conflict: the Palestinians refuse to recognize Israel's sovereignty over the territories they claim.

6 - UNESCO's past interventions in Jerusalem: a legal basis for future interventions

The current section examines the dynamic role of UNESCO, its scope and specific involvement in the Old City of Jerusalem. Its past interventions through Resolutions and Recommendations, its mediation work concerning the reconstruction of the Mughrabi Gate Ascent and the proposed "Action Plan" (2008) are worthy of consideration. In such a peculiar case, the role of UNESCO is not simply circumscribed to the application of the international standards for the protection of the cultural heritage. Considering the special protection accorded to cultural properties in time of armed conflict and occupation, a few introductory considerations can be drawn up:

- as previously introduced, a vast body of legislation, such as the UNESCO's 1972 and 2003 Conventions for the Protection of the World Cultural Heritage and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, provide protection for the cultural heritage endangered by armed conflict and occupation;

⁴⁷ C. LARKIN, M. DUMPER, *UNESCO and Jerusalem: Constraints, Challenges and Opportunities*, in *Jerusalem Quarterly*, Vol. 2009, 2009, p. 16 ss., and *The Politics of Heritage and the Limitations of International Agency in Contested Cities: a Study of the Role of UNESCO in Jerusalem's Old City*, in *Review of International Studies*, Vol. 38, 2012, p. 25 ss.

⁴⁸ B. RUBIN, *Israel, Occupied Territories*, in *Max Planck Encyclopedia of Public International Law*, October 2009.



- the protection of cultural rights implies the recognition of certain additional rights with regard to holy places, namely, the freedom of access and of worship, as well as the protection of those places;
- the protection of cultural and religious sites located in the Old City of Jerusalem is a fundamental step to allow the development of science and culture and to empower the exercise of fundamental religious freedoms;
- the specific role of UNESCO gets more tangled because the international discipline providing for the protection of holy places is actually applied in a “contested context”, also referred to as hostile background of competing sovereignty. This hostile background has been qualified by the UN Institutions as a case of military occupation, falling under the dedicated international regulatory measures. Furthermore, the application of international provisions gets even more difficult because the occupied State's sovereignty is itself contested by the occupying power. Accordingly, the legal status of these territories binds the occupying State to safeguard and take appropriate measures to preserve the cultural and religious properties situated in occupied territory. A regime of “special protection” is therefore applicable to world heritage in extra-ordinary circumstances: this framework is designed to provide a higher standard of protection by imposing, among others, the obligation to refrain from using cultural property and its surroundings for military purposes, as well as the obligation to refrain from directing acts of hostilities against it⁴⁹. In this perspective, UNESCO's interventions and monitoring powers in the Old City of Jerusalem are identified within the legal framework of Art. 55 of the 1907 Hague Regulations⁵⁰: an occupying State shall be regarded as an “administrator or usufructuary” of the property situated in the

⁴⁹ The criteria and conditions for the eligibility of cultural properties in a regime of special protection are specified, the immunity of cultural properties under special protection is specified by refraining from any act of hostility directed against such property, see art. 8 and 9 of the *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, 1954; the difference between the standards imposed during armed conflicts by the regime of special protection and the respect owed to cultural property in peace situations is extremely minor, see **R. O'KEEFE**, *The Protection of Cultural Property in Armed Conflict*, Cambridge Studies in International and Comparative Law, 2006, p. 140 ss.

⁵⁰ “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct”, see art. 55 of the *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907.



administrated country. This situation entitles the usufructuary to use and enjoy the fruits of another's property for a period without damaging or diminishing its substance. In the case of non-renewable resources such as mines and quarries, there is authority for the view that an occupying power may, as usufructuary, continue exploitation of existing sites but may not create new sites or extend existing ones. Following the same line of reasoning of the 1972 WHC, Art. 43 of the Hague Regulations has been interpreted as obliging the occupying State to exercise its powers for the benefit of the occupied area, altering as less as possible the pre-existing public, governmental and administrative structures⁵¹. Indeed, in the event of an armed conflict or occupation, any Member State occupying the territory of another State should refrain from carrying out archaeological excavations in the occupied territory. In the event of historical finds being made, particularly during military works, the occupying power should take all possible measures to protect these finds, which should be handed over, on the termination of hostilities, to the competent authorities of the territory previously occupied, together with all documentation relating thereto. Any archaeological excavation, alteration or change of use of cultural property in occupied territory shall be carried out in close cooperation with the competent national authorities of the concerned territory⁵².

According to this legislative introduction, since 1945, UNESCO has played a central role in encouraging the protection and preservation of cultural and natural heritage located all around the world. Considering the Old City of Jerusalem a Property of "Outstanding Universal Value", it is fundamental to bear in mind that the issue of the management of the Holy Places of Jerusalem is one of the most complicated aspects of the Israeli-Palestinian conflict. The hostility is not just a dispute over land but it is struggle for the exercise of sovereignty over sites charged with religious sentiments, connected to national identity and raising political sensitivity. UNESCO's initial involvement dates back to 1967:

- there was a growing international and local concern over the Israeli demolition of the Mughrabi quarter;

⁵¹ "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country", see art. 43 of the *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907.

⁵² Art. 9 of the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, Paris, 1999.



- the commencement of large scale excavations or “mythological digs” in the Jewish quarter and the southern side of the Haram al Sharif exacerbated the debate between the parties.

For what concerns the first circumstance, in the framework of the decision to develop and expand the area of the Western Wall Plaza, Israel destroyed houses in the Moroccan (Mughrabi) neighbourhood and expropriated the Wall itself, the Plaza and the whole Jewish Quarter of the Old City, declaring them (Jewish) national property⁵³.

For what concerns the archaeological excavations in the Old City of Jerusalem, the General Conference of the UNESCO issued immediately after their beginning a strong condemnation of the activity undertaken by Israel⁵⁴. The General Conference urgently called on Israel, the Occupying Power, to stop any attempts to alter the Old City's features and its cultural and historical character, particularly with regard to Christian and Islamic religious sites. The significance of this censure was not only that it recognized Jerusalem's status as an occupied, administered and contested city, but it also acted as a reminder of the illegality of archaeological excavations in the Occupied Territories, imposing some obligations upon the Occupier. What is more, the controversy over the archaeological excavations in the Occupied Territories focuses on the activities undertaken in Jerusalem's Holy Places. The archaeological works commenced shortly after Israel assumed military control (Six Days War) over the area, following the termination of hostilities. The areas concerned include the soil along the monumental Western Wall surrounding Haram Al-Sharif compound, containing the two Muslim mosques of Al-Aqsa and the Dome of the Rock, and land in adjacent Moslem Waqf territory and in the old Jewish quarter. A particular aim of the excavations included the exploration of areas adjacent to the Herodian Wall and examination of the lower strata presumably enclosing the First Temple, a site profoundly significant to the Jewish religion. Despite the general care and concern Israel claims having adopted in carrying out excavations, UNESCO and the Palestinian side

⁵³ T. NAJEM, M.J. MOLLOY, M. BELL, J. BELL, *Contested sites in Jerusalem; The Jerusalem Old Initiative*, Routledge, 2018.

⁵⁴ The acts concern not only archaeological digs, but also, acts of destruction clearly violative of the 1972 Convention, see UNESCO 15 C/Resolution 3.342 and 3.343; 82 EX/Decision 4.4.2; 83 EX/Decision 4.3.1; 88 EX/Decision 4.3.1; 89 EX/Decision 4.4.1; 17 C/Resolution 3.422; 18 C/Resolution 3.427; 19 C/Resolution 4.129.



declare that certain property of historical and cultural significance to the Arabs have been destroyed⁵⁵.

On a general basis, UNESCO may intervene to the safeguard of the cultural heritage under Art. 23 of its Constitution or pursuant its mandate under article 1(3) of its Constitution to maintain, increase, and diffuse knowledge by assuring the conservation and protection of world's inheritance of books, works of art and monuments of history and science. For what concerns the practical interventions of UNESCO in the Old City of Jerusalem, it is possible to draw different phases of engagement. The first phase of UNESCO's intervention in Jerusalem (1967- 1971), saw a breakdown in relations between the UN International Agency and the Israeli government, after the Israeli refusal to cooperate with UNESCO on the management of the heritage of the city⁵⁶. This public position of warning to the occupying power was followed up by a controversial admonition in 1974, in which UNESCO suspended all forms of assistance to Israel due to its "persistent non-compliance" and flagrant disregard towards the preservation policies of "the historical features of the City of Jerusalem"⁵⁷. Most remarkably, Israel is a signatory to both the 1954 Hague Convention and its Protocol for the Protection of Cultural Property in the Event of Armed Conflict, that legitimate UNESCO's engagement with the Old City. Notwithstanding the Israeli accession to the two main international instruments, the attitude of the Occupying State is interpreted by the UN Institutions as contradictory to the aims of the Organization: the Israeli persistence in altering the historical features of the City of Jerusalem and in undertaking excavations, which constitute a danger to its monuments, is an unequivocal sign of rejection of the UNESCO's presence⁵⁸. More precisely, this rejection seems to be the consequence of the controversy over the legal occupation law treaties to East Jerusalem, which Israel does not treat and regard as occupied territory.

An utterly significant step in UNESCO' s involvement took place in 1981, when the Old City of Jerusalem and its Walls have been officially

⁵⁵ **J.A.R. NAFZIGER**, *UNESCO-Centered Management of International Conflict Over Cultural Property*, in *Hasting Law Journal*, Vol. 27, Issue 5, Art. 4, 1-1976.

⁵⁶ **S. RICCA**, *Reinventing Jerusalem: Israel's Reconstruction of the Jewish Quarter after 1967*, I.B. Tauris, London, 2007, p. 127 ss.

⁵⁷ *Resolution on protection of cultural property in Jerusalem*, 44 General Conference of UNESCO, 20 November 1974.

⁵⁸ Resolution 4/7.6/13, UNESCO, General Conference, 1 January 1978.



added to the UNESCO World Heritage List (WHL)⁵⁹. Since this year, the Property located in Jerusalem is an example of “a masterpiece of human creative genius”, which bears “a unique or at least exceptional testimony to a cultural tradition or a civilization which is living or which has disappeared”. The value that Jerusalem represents for the three religions of Judaism, Christianity and Islam was the only possible explanation for the unanimous decision of the World Heritage Committee, in full agreement in appreciating Jerusalem's unique importance in view of the universal values from the religious, historical, architectural and artistic points of view. Furthermore, the precious heritage contained inside the Old City Walls has been re-conducted since 1982 to the list of the “World Heritage Site in Danger”⁶⁰ because of the particular concern caused by political tension insisting on the contested area of Jerusalem.

Although this was a positive attempt to bring the Old City under the remit of UNESCO's conservation guidelines and legal framework, Israel refused to endorse the WHC, instead protesting Jordan's (an external state) entitlement to nominate the Old City to the WHL, given that it was not the responsible power. This dispute further politicised the whole process and led to the growing alienation between UNESCO and its main funder, the United States⁶¹. The UNESCO's mission to safeguard the Old City's Cultural and Religious Heritage between the years 1971-1990, was certainly compromised, though it involved attempts of reconciliation, trying to re-build relations with the Israeli government and UNESCO.

It is possible to draw a third phase, from 1990 to 1999, when UNESCO tried to play a more active role in protecting the cultural heritage of the city. A new Special UN Representative, Professor Raymond Lemaire, has been appointed as Advisor to the Directorate General. The purpose of his actions, affected by the First Intifada and the Oslo Agreements, was to

⁵⁹ Jordan has been elected as a member of UNESCO and as a State Party to the Convention for the protection of the World Cultural and Natural Heritage; it presented its nomination for the inscription of "The Old City of Jerusalem and its Walls" on the World Heritage List, see CC-81/CONF. 008/2 Rev., *Convention concerning the protection on the world cultural and natural heritage*, World Heritage Committee, UNESCO, First Extraordinary Session, Paris, 30 September 1981.

⁶⁰ After Jerusalem has been put on UNESCO's World Heritage Site in Danger List, an immediate World Heritage Fund assistance is allocated and the international community is alerted about the existence of the endangered site, see CLT-82/CONF.014/6, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, Bureau of the World Heritage Committee, Sixth Session, Paris 20 August 1982.

⁶¹ C. LARKIN, M. DUMPER, *UNESCO and Jerusalem: Constraints, Challenges and Opportunities*, in *Jerusalem Quarterly*, Vol. 2009, 2009.



draw up a report on the safeguarding of the city's heritage of monuments and buildings. The attention of Professor Lemaire was focused mainly on the following subjects: the excavations, the safeguarding, restoration or rehabilitation operations carried out in the part of the city lying to the east of the Israeli borders and the consideration of a complaint lodged by the Jordanian Government with the Director-General concerning the violation and conversion into a national park of Muslim cemeteries situated along the eastern part of the Old City. At the same time UNESCO supported, since 1997, several activities for the promotion of cultural rights within the City of Jerusalem in cooperation with Jerusalem Institutions. Indeed, the end of this third phase is characterized by the new born hopes of the Oslo Accord (1999), such as the establishment of a Palestinian state for May the following year. The Israeli Ministry of Justice was prompted to evaluate the Conventions and Charters that were not ratified by Israel: this review included the World Heritage Convention and as a result, the Israeli Government at its meeting on the 8 August 1999 empowered the Minister for Foreign Affairs to ratify the WHC which was presented to UNESCO on the 6 October 1999, coming into effect three months later. A fourth phase of engagement can be delineated⁶²: UNESCO is trying by all the available means to involve both the parties in the resolution of the dispute, though there is a general scepticism in maintaining an effective policy and cooperation with the Israeli state.

The signing of a "Memorandum of Understanding on Cooperation between UNESCO and Israel" represents the recognition and acknowledgement of the existing partnerships and heritage commitments within the Old City of Jerusalem. The Israeli side perceives the Memorandum as a proper recognition of its role in the city; scholars note

⁶² This fourth phase is corresponding to the rise of the Second Intifada, after popular Palestinian discontent grew during the Oslo peace process because the reality on the ground did not match the expectations created by the peace agreements. From 1993 to 2000, many aspects of the Israeli occupation of the West Bank and Gaza Strip deepened rather than abated. Palestinians expected their lives to improve in terms of freedom of movement and socio-economic standing. Furthermore, organizations on both the Israeli and Palestinian sides were prepared for violence, in part because the other party was using or preparing for violence. On the Palestinian side, younger militants also believed that the ability to respond with force would improve any negotiated outcome by highlighting for the Israelis what would happen if they were not sufficiently forthcoming at the negotiating table. When the confrontations started, Israeli and Palestinian organizations followed their game plans, exacerbating and escalating the violence, see **J. PRESSMANN**, *The Second Intifada: Background and Causes of the Israeli-Palestinian Conflict*, in *The Journal of Conflict Studies*, Vol. XXIII, No. 2, Fall 2003.



that, from the Palestinian perspective, such an agreement represents a process of political normalisation and thereby is legitimizing the Israeli occupation of the city. In other words, UNESCO's activity in Jerusalem is often met with difficulties because of the need to coordinate with various authorities: Israel, which is the sovereign country, Jordan, which is responsible for the administration of the Temple Mount/Haram al-Sharif, and the Palestinian Authority, that has recently gained full membership as a State to UNESCO⁶³. For what concerns this last topic, UNESCO is the first UN agency that recognizes since 2011 Palestine as an independent State. The recognition of Statehood and Sovereignty of a contested land in which cultural and religious heritage exists, presents several consequences.

First, as a Member State of UNESCO, Palestine became a state party to the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict (and Second Protocol), the 1972 WHC, and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage⁶⁴. Palestine will be therefore able to apply for the World Cultural Heritage recognition of its cultural and religious heritage of symbolic significance within the Occupied Territories. This may include landmarks and elements, which have been declared as national heritage by Israel. This further step towards the Palestinian Independence may promote the enjoyment of their cultural and religious rights, but, once again there would be a conflict of sovereignty and ownership over the sites that both claim. After Palestine's ratification of the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage in 2011, the Palestine Tentative List was outlined and finalized in 2012. This list constitutes a database of those properties, which Palestine intends to consider for nomination on the World Heritage List. Subsequently, on 2012 the Church of the Nativity and the Pilgrimage Route in Bethlehem were inscribed on the World Heritage List as the first Palestinian cultural site.

Second, UNESCO plays a role that raises political sensitivity, in a conflict with strong cultural and religious components: on the one hand,

⁶³ WHC-12/36.COM/5A.1, Paris, 11 May 2012.

⁶⁴ Particularly important is the Second Protocol to the 1954 Hague Convention, which provides for individual criminal responsibility and sanctions under the principle of universal jurisdiction. Palestine also ratified several international instruments for the Protection of Cultural Heritage, such as: *Convention on the Protection of the Underwater Cultural Heritage*, Paris, 2 November 2001; *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Paris, 20 October 2005; *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris, 14 November 1970.



this position has enforced the Agency's powers within its field of competence, but on the other hand, if UNESCO fails to treat the Palestinian State as other member states, it may be accused of impartiality.

Third, Israel may deny the presence of UNESCO within its territory and may claim the ownership of its own contested national heritage, such as the Temple Mount, including the Haram al Sharif Mosque, the Rachel's Tomb/ Bilal Ibn Rabah Mosque and the Tomb of the Patriarchs, both of which are in the West Bank. For what concerns the latter, in 2017 UNESCO recognizes the religious site as a Palestinian World Heritage Site, moreover listing it as world heritage site in danger. This is a very holy place both for Judaism and Islam; the Jews believe that this is the place where Abraham, Isaac and Jacob and their wives are buried. Muslims built there a Mosque, as they revere the prophet Abraham as well. Situated in Hebron, it is the largest Palestinian city in the occupied West Bank with a population of some 200,000. About 1,000 Israeli settlers live in the city, while religious friction between Muslims and Jews have been increasingly fomenting. The reasons to inscribe the religious site of Hebron within the Palestinian World Heritage Site are a consequence of the urgent request by the Palestinian Authority to protect the integrity and authenticity of the site from alleged acts of vandalism and destruction, including limitations to allow Muslim to access the site. UNESCO declares that religious aspects do not constitute the ground of its decision but Israel claims that the Palestinian Authority has undertaken this initiative motivated by both political and religious motifs.

Though the conflicting and competing parties are still struggling for the exercise of sovereignty in the Holy Land sites, it is valuable to analyse UNESCO's engagement with Jerusalem through the lenses of its two most noticeable practical heritage initiatives: - on the one hand, there has been a desperate attempt to mediate and create consensus over the restoration of the Mughrabi Gate Ascent⁶⁵; - on the other hand UNESCO has elaborated a wide-ranging "Action Plan" to safeguard the Old City of Jerusalem's cultural heritage.

7 - The Mughrabi Gate Ascent

⁶⁵ N. SHRAGAI: *Housing Ministry: Mughrabi Gate Construction and Dig to Go On*, in *www.haaretz.com*, February 13 2007; U. BENZIMAN, *What Israel Gained - And Lost - by Unifying Jerusalem* (in *www.haaretz.com*), June 7, 2017.



The dispute over the construction of a new ascent to the Mughrabi Gate illustrates both the opportunities offered by UNESCO's interventions in the Old City of Jerusalem and the compressed powers of the agency in the field of the preservation of cultural heritage in a circumstance that raises political and cultural sensitivity. This Mughrabi pathway is a wooden bridge connecting the Western Wall Plaza with the Mughrabi Gate of the Temple Mount in Jerusalem. Israel's renovation of the Mughrabi Gate Ascent in February 2007 has followed its collapse (2004), due to rainstorms, snow and minor earthquakes: the new plan to establish a permanent path has provoked both local fomentation and international concern. UNESCO, that led out the most significant UN intervention, firstly recommended the Israeli Antiquities Authority provide the World Heritage Committee with the proposed final design of the Mughrabi Ascent, whose principal aim should have been the maintenance of the authenticity and integrity of the site, carrying on excavations only to resume the plan finalised and under the supervision of international experts co-ordinated by UNESCO⁶⁶. With more details, all experts involved in this intervention agreed that the structures of the Mughrabi Ascent, after the completion of the archaeological excavations conducted by the Israel Archaeological Authority in 2007, constitute an important testimony to the history of Jerusalem that need to be preserved. There was also agreement that an urgent conservation action strategy was needed to preserve the authenticity of the site. As the Mughrabi Ascent has been a pedestrian access to the Haram al Sharif compound, preserving its authenticity requires the maintenance of its character and the re-establishment of the ascent along a path as close as possible to the original design. During the professional discussions concerning the re-building of the Mughrabi Gate Ascent, different proposals were advanced by Israeli, Jordanian and Waqf technicians. UNESCO is of the view that:

“the Israeli proposal of an elevated bridge that follows a continuous ascending curve is more distant from the shape of the original pathway than the Jordanian proposal, which foresees a stepped pathway following the irregular directions of the pre-existing pathway⁶⁷”.

Furthermore, the agency added that the Israeli proposal does not foresee the landing of the bridge in alignment with the Mughrabi Gate,

⁶⁶ W. PULLAN, M. STERNBERG, L. KYRIACOU, C. LARKIN, M. DUMPER, *The struggle for Jerusalem's Holy Places: Radicalisation and Conflict*, Routledge, London, 2013.

⁶⁷ *Jerusalem and the Implementation of 34 C/Res. 47, 177 EX/Decisions 19 and 20*, UNESCO Executive Board 179 EX/9, Paris, May 2008, p. 3 ss.



unlike the original pathway. Beyond its efforts to conciliate the different positions, UNESCO has elaborated a dual track approach referred to as a “Reinforced Monitoring Mechanism” with the aim of establishing periodic (bi-monthly) updated reports by the World Heritage Committee on the endangered site. After these attempts of dispute resolution, there are some factors that has been perceived with extreme suspicion by the Israeli side and have probably caused an interruption to the negotiation process between UNESCO and Israel. First, the objections and concerns on the plan proposed by Israel for the reconstruction of the Ascent led to a lack of collaboration: the original plan, despite 14 public objections and despite the alternative plans, was approved by the “Jerusalem District Planning and Construction Commission”, on August 2008. Second, the call on Israel to cease the excavations remained unaddressed, as witnessed by the Israeli continuation of works at the site up until early May: this fact has been interpreted by the international community as the Israeli ongoing determination to unilaterally process the planning scheme through its own national authorities, while de-legitimizing any external intervention. Third, the necessity of elaborating a strategy policy under the strict supervision of a specialized international agency for the preservation of the cultural heritage, in an attempt to achieve a consensual solution, remains uncompleted, as only two meetings between the concerned parties have took place in line with UNESCO's recommendations. In 2010, the Jordanian Authorities, as a concerned party, provided an update on the Ascent's conditions. They noticed fallen stones from the Northern Ottoman wall of the Ascent but were not authorized to carry out the emergency stabilization works thereon. The report from the Jordanian authorities makes references to The Hague 1954 and the 1972 Conventions, to the status quo and to the decisions of the Executive Board and of the World Heritage Committee thereon. It reiterates the intention by the Jordanian authorities to “submit and implement a design for the Mughrabi Gate Pathway to the World Heritage Centre, which maintains the integrity, authenticity and cultural heritage”⁶⁸. Recently, the World Heritage Committee reaffirms its concern regarding “the continuous, intrusive archaeological demolitions and

⁶⁸ Israel should enable the necessary access to the site to the Jordanian and Waqf experts, most notably, in order to take the necessary measurements for the concept design proposed by Jordan, as evaluated by ICOMOS and ICCROM; it should enable Jordan as a concerned party to present its final design for the restoration and preservation of the Mughrabi Ascent, see UNESCO_186/EX5, Implementation of 35 C/Resolution 49 and 185 EX/Decision 5 relating to the Ascent to the Mughrabi Gate in the Old City of Jerusalem, UNESCO, Paris, March 2011.



excavations in and around the Mughrabi Gate Ascent” and calls on Israel “to cooperate with Jordanian Waqf Department and experts to facilitate the restoration of the Ascent to the Mughrabi Gate”. Currently, the Mughrabi Gate's dispute still remains unsettled and during the past several years the ascent has been the background of violent clashes between the conflicting parties⁶⁹. Nevertheless, the importance and the prospects of UNESCO's engagement with a politically sensitive area, are likely to seem, on a theoretical approach, the most suitable means of international dispute resolution: UNESCO reiterated its will of preserving the authenticity and integrity of the sites through the 2008 “Action Plan for the Safeguarding of the Cultural Heritage of the Old City of Jerusalem”.

8 - The 2008 Action Plan for the Safeguarding of the Cultural Heritage of the Old City of Jerusalem

Drawing on earlier UNESCO's conservation experiences in Aleppo (1992) and post-conflict Iraq (2003), the Jerusalem “Action Plan⁷⁰” creates a unified heritage database based on a digital inventory and mapping of historic buildings, monuments, sites and spaces. Through discussion, dialogue and engagement with the main parties and leading stakeholders in the Old City, the Action Plan has positioned UNESCO and the WHC to seem the most effective and appropriate initiative in a politically and culturally contested territory. The “Action Plan” began in January 2005 with a consultation of a Committee of Experts and the compilation of a conservation database and an Old City inventory. The emerging proposals included nineteen conservation projects, involving Churches (St. John the Baptist) Yeshivas (Etz Hayim), Islamic schools (Madrassa al-Kilaniyya) and Souks (Suq al-Qattanin), rehabilitation manuals for residential housing, training of local crafts and micro-financing schemes and cultural activities⁷¹. While such plans outline desperately the need of interventions, it remains to check whether these projects actually received adequate support and implementation from the Israeli municipal authorities or the Waqf

⁶⁹ J. DAVIDOVIC, *Several injured as police clash with rioters on Temple Mount*, in *www.timeofisrael.com*, 24 September 2014.

⁷⁰ *Report of the UNESCO Technical Mission to the Old City of Jerusalem*, Doc. 176 EX/Special Plenary Meeting/INF.1, UNESCO Executive Board, Paris, 12 March 2007.

⁷¹ *Action Plan for the Safeguarding of the Cultural Heritage of the Old City of Jerusalem*, 32 C/Res. 39, UNESCO, Paris, September 2007; S. RICCA, *Reinventing Jerusalem: Israel's Reconstruction of the Jewish Quarter after 1967*, I.B. Tauris, London, 2007.



Administration, or indeed the financial backing from the international community.

Currently, the status of the Action Plan is that of abeyance, mainly due to recent political conditions on the ground and in the country. Although the first phase (Inventory and Priority map, Project Profiles and the Rehabilitation Manual) has been completed, no restoration projects have officially begun yet. Some scholars argue that the "Action Plan" remains a program without reference to the political context: some sensitive aspects, such as those of legal ownership, building permission, and political control are not taken into consideration. Another weak point of the project, as Professor Larkin stated, is "The rehabilitation Project of the Suq al-Qattanin/ The Cotton Merchant Market". It pursues a crucial conservation intervention, but it fails to adequately deal with the practical challenges of the security blocks and closures of the Haram al-Sharif entrance, and the restrictive laws governing commercial licenses. In other words, it makes little reference to the social division, to the IDF security presence (through checkpoints and closures), economic regulations and the impact of the Fence. UNESCO Director General Koichiro Matsuura, argued that UNESCO doesn't want to deal with political issues, but it is duty-bound to preserve the authenticity of Jerusalem within the scope of the WHC. Another weakness of the project has been found in the fact that it takes into account the preservation of monuments and religious sites, while not relating them to urban revitalization and improvement of social infrastructures, such as housing, sanitation and water supply.

Despite its lacunas, the Action Plan offers important contributions in several main areas. It has assembled a massive database and archival lists, composed by mapping of historic buildings, monuments, sites and spaces, upon which all future conservation plans can rely on. Furthermore, drawing on other UNESCO's conservation experiences, in ancient cities such Aleppo (1992) or in post-conflict areas such as Iraq (2003), the Jerusalem Action Plan suggests the UNESCO potential conciliation and dispute resolution role, at least in terms of legislative and practical efforts. The strategy synthesises a mix of local knowledge and international expertise aimed to the creation of an agreement on the preservation and management of holy places in a contest of competing sovereignty. Finally, through discussion, dialogue and engagement with the main parties and leading stakeholders in the Old City, the Action Plan, likewise the Mughrabi Gate mediation experience, have positioned UNESCO and the WHC to be able to be the more effective actions at a more politically propitious occasion.



9 - UNESCO, Resolution 200 EX/PX/DR.25.2: “Occupied Palestine”

Since 1967, UNESCO has constantly played a dominant role in the Old city of Jerusalem: it exercised its power in the field of the preservation of cultural heritage in a contested area, not only through practical plans, but also through legislative instruments and Resolutions.

On one side, it recognized the importance for Jews, Muslims and Christians of the most sacred and controversial sites in Jerusalem. On the other side, it also recognized the independence of the Palestinian people with a declaration of Statehood. Notwithstanding its interventions and powers in Jerusalem have been affected by the ongoing Israeli-Palestinian conflict, the monitoring body, such as UNESCO, is able to exert moral pressure on countries by issuing reports and making recommendations, as it did through the 2016 Resolution.

This legislative piece represents the most recent attempt of intervention in the Old City of Jerusalem, as it deals with very sensitive issues, such as the use of cultural heritage as a mean to legitimate national discourses and justify hegemonic control over them. UNESCO condemns the conduct of Israel and considers it to be conduct of concern for international law on the basis of the provisions of the four Geneva Conventions (1949), the 1907 Hague Regulations on Land Warfare, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and its additional Protocols, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) and the Convention for the Protection of the World Cultural and Natural Heritage (1972), the inscription of the Old City of Jerusalem and its Walls at the request of Jordan on the World Heritage List (1981) and on the List of World Heritage in Danger (1982), and the recommendations, resolutions and decisions of UNESCO on the protection of cultural heritage. The agency stresses the attention on the alteration of the Status Quo of the Haram al Sharif Mosque, illegal excavations, works, construction of private roads for settlers and a separation wall inside the Old City of Al-Khalil/Hebron and regrets the continued Israeli refusal to act in accordance with UNESCO and the World Heritage Committee decisions, that request experts meeting in order to outline joint implementation programs for the preservation of the cultural heritage of the city.

UNESCO intentions witness that, with all its available powers, a particular attention and involvement have been addressed with many efforts and in the long-term period in the Old City of Jerusalem. There has been an initial consent and awareness of the prospects offered by the



agency's intervention. Although, the lack of legal enforcement mechanisms and the Israeli complaint about the selectivity of work and excessive focus on the OPT, inevitably brought to the non-compliance and non-fulfilment with the strategies and international law instruments.

10 - Conclusions

It is now appropriate to keep in mind that since 1967, UNESCO's powers have been concentrating in attempts of dispute resolution and decisions for the protection of the world heritage sites in the Old City of Jerusalem.

UNESCO's powers for the protection of holy sites are mainly focused in achieving a broader and more symbolic safeguard through legal protection of the major international instruments. *The three elements of contested land, contested sovereignty and contested world heritage sites constitute a perfect storm, stressing the attention not just on UNESCO's role as UN independent mediator institution, but also on its overall human right (world heritage sites and religious freedom) protection plans.* The current analysis has examined three interventions in differentiated contexts of the Middle-East: the common legal denominator is the 1972 World Heritage Convention, as the major international instrument for the safeguard of the world heritage sites in an ancient city (Aleppo, though, outside a conflict situation, at the time), in post-conflict zones (Iraq) and in a contested land (the Holy Land). In such a circumstance though, UNESCO places much more emphasis on the safeguarding of the contested cultural heritage in Jerusalem rather than other places: this is, without precedent parallel, the longest situation of unresolved conflict. *UNESCO's fundamental scope is the overarching protection of the rights stemming from the preservation of cultural heritage sites, such as religious freedom and right to cultural identity.* In this perspective, within the scope of the 1972 World Heritage Convention and the 1954 Convention for the Protection of the Cultural Property in the Event of an Armed Conflict (including occupation), the right to access and enjoyment of cultural heritage sites (and connected rights) seem to receive the same treatment as a human right. This position is the foundation point for UNESCO's legal and practical engagement with the Old City of Jerusalem. In first place, the World Heritage List provides an international framework of the world heritage sites where Member States are to direct their economical and social actions: implications in the field of identification, protection and promotion of the above mentioned cultural sites are bonding the signatory States. Second, its other significant feature is the integration of the concepts of nature conservation and preservation of cultural properties in a single



treaty. In a greater detail, some scholars refer to the WHL as a worldwide platform for the individuation states who have failed to fulfil their responsibilities, but they highlight that its frailty is the lack of necessary legal provisions or penal measures to compel compliance or prevent the deliberate destruction of cultural heritage. For example, the controversy surrounding the Mughrabi Gate Ascent, exemplifies UNESCO's potential as an independent mediator and global guardian of threatened world heritage having an outstanding universal value, while at the same time it demonstrates its continuing impotence for what concerns the ground of enforcement and compliance to the 1954 Hague Convention and 1972 World Heritage Convention. Despite the close attention paid to Israeli actions through the reinforced monitoring mechanism, the inability of UNESCO to materially affect the unilateral excavations and the proposals for the design of the Mughrabi Gate Ramp points out the weakness and limitedness of UNESCO's powers. Perhaps, with much more economic and social efforts than other areas, UNESCO prioritizes the Old City of Jerusalem. This awareness derives from the perception of cultural property and cultural heritage as key factors in political, social, and economic post-conflict/ occupation stabilisation and reconciliation process. UNESCO's potential to foster intercultural dialogue and provide a stable base for a building peace process is a matter of fact. It is also indicative of political forces pushing in this direction. Even so, UNESCO have encountered and is still encountering many limits in its concrete attempts to cooperate with the responsible power, Israel: the inherent weaknesses of UNESCO's involvement in a contested area is, as earlier introduced, its limited powers in providing for compulsory and binding legal measures. For instance, the 2008 Action Plan has represented a comprehensive and expertise-based policy dealing with Jerusalem's cultural heritage needs, but many blemishes caused its progressive defeat. The positive features see the prioritization of some essential cultural elements such as: - the global participation of the community to the restoration projects, including heritage education and dedication of spaces for religious and cultural activities; - the creation of a permanent UNESCO executive body in Jerusalem to oversee the implementation of the plan; - inter-agency coordination to strengthen the moral, political and financial support from the international community. The expectations of relying on UNESCO's policy to realize an all encompassing safeguard of the cultural heritage sites have been interrupted by the lack of impacts on the everyday life, urban and social fabric of the Old City of Jerusalem. The good results in the preservation and conservation of cultural and religious sites are to be considered effective only if driven by substantial ameliorations in the



occupied population's social and economic living conditions. This side of the project is somehow deprived of social considerations, while strong political elements have played a crucial role for the legal success of UNESCO's Action Plan. Indeed, the failed endeavours to make a difference on Israel's heritage policy in Jerusalem also accentuate UNESCO's strict dependence on Member States' goodwill and approval.

The powers of the agency in a politically contested area are also the result of the reluctance of Israel in conferring powers of cooperation and supervision to an external agency. Under this perspective, some scholars claim that the fundamental issue is less to do with Israel's failure to comply with UNESCO's legal provisions, but rather the inherent weakness of international law itself: once again, the unavailability of enforcement mechanisms which offers oversight, guidance and appropriate sanctions exposes the cultural heritage to threats, or, from the Israeli perspective, the bias of international institutions and their detachment from conditions on the ground. Indeed, UNESCO mainly represents a form of international supervisor and assistance, but its legal powers of intervention are enclosed by the concept of "world heritage", subject to the cultural and legal background of Israel, its economic willingness and political considerations. The latter has been increasingly representing a mean to de-legitimize and scrutinise the properties and content of the safeguard offered by UNESCO. Its decisions raise political sensitivity and opposition both by the Israeli and the Palestinian side.

As its ongoing commitment is taking place in a situation of unresolved and still undefined conflict, that gives enough space for criticism: any decision to genuinely preserve the cultural and religious sites within the scope of the international instruments has been the centre of a dispute dealing with a suspected impartiality, with a particular concern by both sides to UNESCO's radical agenda. Under this perspective, UNESCO matches the concepts of cultural heritage with the one of State's self-determination, building this notion upon shared values, customs and history, which are all parts of the concept of heritage. Therefore, the meaning that people give to their heritage reinforces the feeling of belonging to their nation, partially explaining the motives of the current controversy arising for the exercise of sovereign powers in a politically contested Jerusalem and in the OPT. For instance, in this context, cultural heritage has often been used to support nationalist and ethnocentric views: some scholars refer to such a phenomenon as a process of politicization of cultural heritage sites in order to serve the interests of ultra-orthodox religious ideology and strategic expansionist interest, "promoting a



distorted version of history-merging myth and legend with archaeological fact”.

UNESCO's interventions and the WHC have shown to be an efficient tool to reinforce or create national legal mechanisms aimed at safeguarding the cultural heritage in post-conflict or ancient areas. In this case nevertheless, it becomes extremely difficult to:

- disconnect the inextricable link existing between the Occupied Population and the World Heritage Sites they identify and claim as their national symbol. The dispute over the Temple Mount led the Arab side to reinforced denial mechanisms of the Jewish attachment to the site. Islamic construction works undertaken without archaeological supervision, Israeli “mythological digs” and construction plans surrounding the Temple Mount, also intensify mutual suspicion and accusations. Farther, the Palestinian Center for Policy and Survey Research is also claiming that Israel had been using over time archaeological findings and distortion of facts as a way to legitimize the annexation of the Occupied East Jerusalem. Israel however, continues to see itself as the natural inheritor of the rights of the Ex British Mandate, and therefore it claims to have ultimate jurisdiction over the religious sites. Consequently, a political compromise would represent for Israel a crumbling of its authority in Jerusalem, undermining its claim to the City, complete and united, and its de facto annexation by 1967. This longstanding controversy on the struggle for the attribution of powers over the world heritage sites suggests that UNESCO is placed in an unbearable position that is seriously shattering its real objectives of safeguard and preservation of the contested holy sites. Within this context UNESCO therefore takes decision with strong political implications that exemplify the divided nature of the Old City of Jerusalem: without the slightest bit of agreement over a comprehensive approach and strategy dealing with Jerusalem’s cultural heritage sites, UNESCO’s approach will remain easily manipulated by parties, misunderstood and legally unbalanced.

Under such a fragmented framework, the agency is likely to fall into a crucial route between: *i*) being rejected or assimilated by the Israeli Government, accepting its permanent presence in the Old City of Jerusalem, leaving aside the fear of remitting to UNESCO a special role within the conciliation process; *ii*) being accepted or contrariwise exploited by the Palestinian Authority that may use the protection of heritage sites as a form of political resistance.

An example of the difficulty to conciliate the different positions dates back to the Palestinian membership with UNESCO. This attempt represents the most meaningful mean by which UNESCO is trying to



protect, through the legitimate exercise of its legal attributions, the world heritage culture of the Palestinian People. This recognition of Statehood has consistent implications in all aspects pertaining to the disputed world heritage sites located in Jerusalem. As previously introduced, as far as UNESCO is concerned, East Jerusalem and the area of the Old City are occupied territory, and therefore, recognition of Palestine corresponds to the recognition of Palestinian Sovereignty over the Old City of Jerusalem. Jerusalem is recognized by UNESCO as a World Heritage Site and then included in the World Heritage Site List in Danger (1982). After the ratification of the major international instruments for the safeguard of the cultural heritage, UNESCO's recognition of East Jerusalem as part of Palestine allows the PA not only to apply for the inscription of its heritage sites within the World Heritage Site List, but it also enables it to work via the organization to advance decisions against Israeli policy in Jerusalem. For instance, Official draft resolutions must be submitted by the member states of the UNESCO Executive Board. Since Palestine is not a member of the Executive Board, draft resolutions on Jerusalem are submitted in its name by states that support it. For example, in October 2016, Algeria, Egypt, Lebanon, Morocco, Oman, Qatar and Sudan submitted the earlier mentioned draft resolution to the UNESCO Executive Board protesting Israel's infringement of the Status Quo in the Temple Mount and the undermining of Jerusalem as a world heritage site. The draft resolution includes a demand to establish a professional delegation that would investigate how best to protect historic sites in Jerusalem, including the Haram al Sharif Compound: this piece of legislation contributes to the conferral of powers that may plausibly change the political and legal status of the Old City of Jerusalem and the Occupied Territory;

- come to a compromise on the properties inscribed as Palestinian world heritage site List and contested by Israel. Indeed UNESCO has recently recognized the Tomb of The Patriarchs/ Ibrahimi's Mosque as a Palestinian World Heritage Site. The site is object of a recent and fervent controversy, finalized on one side to justify the Israeli settlements expansion in the city of Hebron and, on the other side, to re-establish the Jewish priority on the religious site;

- avoid, as previously introduced, the inevitably political content of the agency's decisions to protect those elements. In the light of the last event of condemnation, the reaction of the Israeli side has opened new criticisms that mainly see UNESCO as a partial institution, pursuing political interests, referring only to Arab heritage sites and denying the Jewish link with the Old City of Jerusalem. In fact, the "Occupied Palestine Resolution" and the inscription of sites within the Palestinian World Heritage List led



the Israeli Government to reconsider its relationship and cooperation with UNESCO. Although there is no compulsory mechanism of compliance with UNESCO's rules and conventions, the strata of customary international law provide a framework for the protection of cultural property: these universal principles of international law prohibit acts of deliberate destruction, holding the perpetrators into account. Furthermore, the adherence to the World Heritage Committee create limitations on the sovereign powers of the State in the fields of cultural heritage and religious sites. In other words, international law instruments remain a central anchor under which new perspectives can be grounded and a wider and more flexible negotiation context can be developed.

The essay has illustrated that while international law provides an efficient framework for a solution to the Jerusalem religious sites question, it lacks a clear prescription over the necessary details, in terms of coercion and enforcement remedies and mechanisms. Contrariwise, the space of ambiguity international law leaves, may be the necessary one for negotiation.

As a result, UNESCO sees itself as a stakeholder in Jerusalem and in the Occupied Palestinian Territories. The agency is supposed to act on the behalf of the Palestinian State, providing it for the submission of cultural property, granting an enhanced protection and allowing requests for international or other types of assistance. Over the next years UNESCO will therefore conceivably continue to assess progress along the lines of a strict collaboration with the Palestinian Authority. The Government of Israel, although its consent seems necessary to realize a shared solution for the management and maintenance of religious sites in Jerusalem, is increasingly alienating the presence and the role of the Agency in the Old City.

UNESCO, for its part, shall hopefully insist on the ambiguous realization of a model mainly based on the harmonization of the relationships between the three different religious communities, without leaving behind the process of internalization, both in Israel and Palestine, of the international rules and standard for the protection of cultural heritage.