



FACULTY OF LAW
University of Lund

Björn Cinthio

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Supervisor

Professor Mpazi Sinjela, Director of WIPO Worldwide Academy

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Preface

In the fall of year 2000 I went to Palestine to conduct a Minor Field Study. The subject of the study was to investigate the connection between Human Rights and Intellectual Property in this part of the world. By the end of September that year the new intifada broke out and I had to leave Palestine without finishing the study. It must be mentioned that the situation of today does not in any way reflect the situation during my time in Palestine. The material I was able to gather during the short period of time I stayed in Palestine combined with UN-documents and numerous reports from different Non-Governmental Organizations (NGOs) is the foundation on which this study rests. The study concentrates on two major subjects: The stealing of the trademark or merchandise mark “Jaffa”, which is and was being used to market different kinds of citrus fruits, and the Palestinian people’s right to its own cultural heritage, mainly in the form of archaeological artefacts.

I would believe that nowhere else in the world is history so much alive as in Palestine/Israel. Historical issues are almost impossible to avoid when you live in this region. People are very aware of history – their own and that of others.¹ Since it is impossible to avoid the question of history and since historical aspects are so important in determining the general evolution of the Middle East, I have chosen to include a passage regarding these matters in my thesis. Historical arguments are used in the political debate almost daily and history is used to justify Human Rights violations.

Introduction

In this thesis I will try to disseminate the issues of Human Rights and Intellectual Property Rights as they are presented in Palestine. This has proven to be not exactly an easy task, since information about these issues is sometimes hard to come by. However I have tried my very best and it is my hope that the reader will be given some insights he did not have before. As for clarifying the Human Rights and Intellectual Property Rights connection, development and interpretation, I can merely hope for offering a

¹ During the fall of 2000 I hitched a ride with an Armenian man and we discussed the expansion of the European Union. The issue was Turkey and he said –“You used to call Turkey the sick man of Europe. You will never let Turkey inside the Union”. Apart from this he also stressed that Turkey had to take responsibility for the genocide of the Armenians in Turkey in the beginning of the 20th century to be approved as members of the European Union, which he never thought that they would.

Palestinian perspective which may sometimes be perceived as a bit narrow, besides the fact that grave Human Rights violations undoubtedly overshadow the Intellectual Property parts of the study.

The research made is based mainly on various UN-documents: NGO-documents as well as more regular literature in the field of Middle Eastern studies, law and history. The Internet has surely proven to be of great assistance in the search for knowledge. In addition to this, I have travelled extensively in the Middle East, mainly in Palestine, and I had the good fortune to be granted a Minor Field-Study scholarship in the spring of 2000. During my time in Palestine I had Sharhabeel Al-Zaeem and Associates Law Firm in Gaza as a focal point in life. From this position I could study the field from within, since this is not only the largest commercial law firm in Palestine, but also a provider of assistance in cases of Human Rights violations.

The thesis is outlined with the history part first since, as described above, history is no laughing matter in the Middle East; it is more viable and living than I have ever experienced in Europe.

Secondly follows a brief description of the Human Rights instruments applicable to the situation; more could have been presented, but the time was just not there. I have intended to give the reader relevant background material for further reading of the thesis.

Thirdly I discuss the study of archaeology in Palestine, followed by the study of cultural heritage and traditional knowledge in Palestine. I have tried to cover as many aspects of the studied objects as possible, in order to disseminate the hidden agenda.

Fourthly a concise summary of the Intellectual Property Rights in Palestine is presented, followed by the study of the famous Jaffa oranges – here the aim is to interpret Intellectual Property Rights as more than just rights.

The History of Palestine

In this passage I deal with the main historical issues which have led to today's situation. This thesis would be anaemic without the historical background of the land in question and I will make numerous references to this chapter during the rest of the thesis. As I stated in the preface, issues of historical nature are of such pregnancy in this region that it is hard for a person coming from as peaceful a part of the world as Sweden to fully grasp it.

During the centuries Palestine has been treasured for its strategically and commercially valuable position. Routes of trade to Europe from Asia have passed the territory and made it rich. The soil was fertile and could feed a quite large population. Palestine could also be used as a base of armies for further advancement into Asia and Northern Africa. For these reasons Palestine has been conquered time and time again during history by the rulers of the time, as we will further see in this chapter. Apart from the commercial and strategic value, there has also been a significant religious interest in the land, especially during the last two millennia.

A Chronology

Palaeolithic and Mesolithic period, 600.000 – 10.000 BC

The first remains of human activity in Palestine are dated approximately 600.000 years ago and have been found in the region of Lake Tabariyya.

The humans of that time lived as hunters and collectors.

Neolithic period, 10.000 – 5.000 BC

Humans start to live as farmers and form small agricultural communities.

Chalcolithic period 5.000 – 3.000 BC

Artefacts of copper and stone from this period have been found near Jericho and the Dead Sea.

Early Bronze Age 3.000 – 2.000 BC

This period is also known as the Canaanite period. The Canaanites settle in Palestine and form cities.

“The biblical term, Canaanite, identifies the people who lived in the land of Israel before the Israelites. Torah and the historical books present the idea that the Canaanites were not one ethnic group, but composed of a variety of different groups: the Perizzites, the Hittites, the Hivites.

Generally archaeologists and biblical scholars mean the Bronze culture of Palestine when they use the term Canaanite. This culture of the Middle and Late Bronze Ages is viewed as stratified with individual city-states ruled by a monarch and warrior class who governed a large free serf class.”²

The Canaanites³ are mentioned in the Bible as a tribe stemming from Ham, son of Noah. Noah had three sons, Shem, Ham, and Japheth, and the conflict over the land of Israel can be recognized as early as this since the offspring of Ham were great enemies to the offspring of Shem who later came to form the house of Israel⁴.

After this a period of instability follows. A large number of conquerors pass.

1.250 BC

Israelite conquest of the land of Canaan after Moses has led the Jews out of captivity in Egypt. The conquest is considered to have taken as long as a century⁵. During the same time the Philistines are said to arrive to the southern coastal plains of Palestine⁶.

² Material Culture of the Ancient Canaanites, Boston University, <http://www.bu.edu/anep/MB.html>

³ “The Palestinians are descendants of two ancient peoples, the Canaanites and the Philistenes” Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p. 69.

⁴ Genesis 9 – 19. Shem got a daughter, Tera, and she became the mother of Abraham, who became father of Ishmael and Isaac. The Muslims regard themselves as stemming from Ishmael and the Jews as stemming from Isaac. Both Muslims and Jews regard Abraham as their patriarch, who considers to be buried in Hebron. The stories of Abraham’s two sons, Ishmael and Isaac, are considered to be a very central part of the Israeli – Palestinian conflict. The mother of Ishmael was Hagar who was a servant woman of Sara, who was the wife of Abraham. Hagar is mentioned in the Bible as coming from Egypt. After Ishmael was born Sara became pregnant and gave birth to Isaac. The Lord promised the land of Israel to the descendants of Isaac and promised Abraham that Ishmael would become the father of twelve tribes. Both Jews and Muslims practice circumcision as their common patriarch Abraham did with his sons as the covenant of God.

⁵ Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p. 8.

⁶ Ibid p. 69.

The Israelite kingdom is strengthened under the rule of King David of the tribe of Judah who rules until 960 BC. King David moves his capitol from Hebron to Jerusalem.

965 – 928 BC

The reign of King Solomon⁷ and the construction of the first temple and the royal palace in Jerusalem.

928 BC

The state is divided into the kingdoms of Israel (Samaria) and Judea.

721 BC

The Assyrian conquest of the kingdom of Israel (Samaria).

586 BC

Judea defeated by Babylonians under Nebuchadnezzar, deportation of the population to Babylon and destruction of the first temple.

539 BC

Persians conquer Babylonia, deportees return to the land of Israel and the second temple⁸ is constructed under the rule of Cyrus the Mede who was the founder of a new Persian empire.

333 BC

Alexander the Great conquers Persia and Palestine comes under Greek dominion.

323 BC

Alexander the Great passes away and is succeeded by the alternate rule of Ptolemy of Egypt and the Seleucids of Syria.

165 BC

The Maccabees revolt against the Seleucid ruler (Antiochus Epiphanies) under the leadership of Judah Maccabee, Judah the Hammer. Judah re-establishes an independent state (the Kingdom of Judea) and a new monarchy which lasts until the Romans conquer Palestine.

63 AD

The Roman general Pompey conquers Syria and then incorporates the independent Kingdom of Judea into the Roman Empire.

⁷ Solomon was the son of King David.

⁸ “In the Hebrew Bible, Cyrus is accorded a degree of respect given to no other non-Jewish ruler, and indeed to few Jewish rulers.” Lewis, Bernard: *The Middle East*, Phoenix Press, London, 2000, p. 27.

70 AD

The destruction of the second temple by the Roman Emperor Titus takes place. During this time the Diaspora begins as a way for the Romans to get rid of the rebellious Jewish people⁹.

132 – 135 AD

The suppression of the Bar Kokhba revolt takes place. Jews are expelled from Jerusalem and Emperor Hadrian builds a pagan city on its ruins. A temple devoted to Jupiter is built on the site of the second Temple¹⁰. The Diaspora is expanded by deportations and captivity. The Romans rename the territory Palestine, or Syria Palæstina, after the ancient Philistines.

330 – 638 AD

As the Roman Empire is divided, Palestine is part of the Christian East Roman Empire, also known as Byzantine, and Christianity starts to spread in the region.

638 AD

With the rise and spread of Islam just years before, Omar ibn al-Khattab enters Jerusalem and ends the Byzantine rule.

661 – 750 AD

Palestine is administered by the Umayyad caliphs from Damascus. Both the construction of the Dome of the Rock (685 – 705) and the Al-Aqsa mosque (705 – 715) takes place¹¹.

750 – 969 AD

Palestine is administered from Baghdad by the Abbasid caliphs.

969 AD

Palestine is administered by the Fatimids from Egypt; rivals to Baghdad.

1071 AD

⁹ The well known fortress of Masada held out until 73 AD.

¹⁰ According to Professor G. W. Bowersock of Princeton eyewitness observers in antiquity witness that the Pagan temple was erected quite some distance from the temple site and that the only thing built on the site of the temple was a statue of the emperor. He concludes this: "Since the truth is not politically helpful, it has been quietly suppressed." Bowersock, G. W.: *Palestine: Ancient History and Modern Politics*, Journal of Palestine Studies, vol. 14, no. 4, 1985, p. 53.

¹¹ This is very central to Zionism and Judaism. The Haram ash-Sharif (also called the Temple Mount) Dome of the Rock and the Al-Aqsa mosque are erected on the site of the second temple and some Jews believe that it is necessary for the coming of Messiah to rebuild the temple. The only thing which is preserved of the temple is the western wall, The Wailing Wall, which is sacred to Jews. In Jewish and Muslim tradition this is the place where Abraham was given order to sacrifice one of his sons by the Lord. In Jewish tradition it is Isaac that is to be sacrificed and in Muslim tradition it is Ishmael, see note 4.

Saljuqs rule Jerusalem and parts of Palestine, officially still under the Abbasids.

1099 – 1187 AD

The Crusaders arrive and establish the Latin Kingdom of Jerusalem.

1187 AD

Saladin, an officer of Kurdish origin, defeats the Crusaders in the battle of Hittin, captures Jerusalem and expels the Crusaders. Palestine is now administered from Cairo. This period is known as the Mamluk Sultanate after the Turkish Mamluks who governed Egypt and Syria. (Palestine was considered to be a part of Syria.)

1516 – 1517

In a series of short effective wars the Ottomans overthrow the Mamluks, who had been in power for almost two and a half centuries, and hold the area until the end of World War I.

1915 – 1917

The Ottoman Empire enters the First World War on Germany's and Austria's side, against Britain, France and Russia. During the latter part of the war, T.E Lawrence, better known to history as Lawrence of Arabia, forms an alliance with the independent rulers of the Arabic peninsula promising them independence if they help to overthrow the Ottoman power¹². During this time another key event regarding Palestine takes place: The Sykes-Picot Agreement of May 1916, which divides this part of the Middle East into two spheres of interest – French (Syria and Lebanon) and British (Palestine, Jordan and Iraq).

After the war both France and Britain come to govern these areas by mandate from the League of Nations, the predecessor of the UN. In 1917 the Balfour Declaration is issued, stating that the British government views with favour the creation of a National Home for the Jews in Palestine.

1918 – 1948

The British Mandate of Palestine was a period of relative calmness and economic growth in the country. Exports from Palestine to Europe

¹² The Husain – McMahon correspondence 1915 – 1916.

increased; among this export were the oranges from Jaffa. But between the years 1936 – 1939 there were substantial Arab protests against the growing Jewish immigration. The Arabs launched general strikes and there were also assassinations of Jews. Some Palestinians refer to this period as the first Intifada, even though the word “Intifada” was never used at the time.

1947

The UN Partition plan. By the end of the Second World War the consequences of the Holocaust shocked the world, and the need for a Jewish National Home was considered to be of great importance. On November the 29th, UN General Assembly resolution 181, regarding the division of the British Mandate of Palestine into a Jewish and an Arab state¹³, was passed with 33 in favour, 13 against and 10 abstentions.

1948

On May the 14th the Jewish community declared independence. The Arab neighbours of the newly created state immediately declared war, which ended with victory for the Jewish army. The newborn state more than doubled its territory during this war, and the remaining parts of Palestine (which had been supposed to become the Arab state) were annexed by Jordan (West Bank) and Egypt (Gaza)¹⁴.

1956

The Suez War

1967

Occupation of the West Bank and the Gaza Strip. Israel launched a sudden attack upon Egypt, which was completely surprised. The Israeli air force almost eradicated its Egyptian opponents, since the Egyptians were still on the ground.

1973

The Yom Kippur War. Egypt and Syria attacked Israel at the same time by agreement. Egypt forced into Sinai, which they had lost to Israel in 1967, and Syria into the Golan Heights, which they lost the same year. At first

¹³ See appendix I, United Nations Partition Plan.

¹⁴ See appendix I, Rhodes Armistice Line.

the attack seemed to be fruitful for the aggressors, but after a few days the Israeli army was able to re-conquer what they initially lost.

1987 – 1991

Outbreak of the first Intifada in the fall of 1987 in Gaza. Intifada literally means “shaking off”.

1993 – 1994

The Oslo Accords peace process culminated with the signing of the treaty on the White House lawn.

2000

The outburst of the second intifada on September the 28th was sparked by Ariel Sharon’s walk to Haram as-Sharif¹⁵. Mr Sharon is considered by many Palestinians to be the man responsible for the massacres in the Palestinian refugee camps Sabra and Shatila in western Beirut which took place in 1982, after the Israeli invasion of Lebanon.

Palestine and the UN

There are numerous documents regarding Palestine in the UN. In this chapter I will look into some of the most well known, and indeed into the documents relevant to this thesis.

The British Mandate of Palestine

Following the events of the First World War, the Ottoman Empire lost control over Palestine to Britain. Palestine, at that time part of Syria which was also under Ottoman control, was now predominantly Arab even though some Jews had continuously been living there “since remote antiquity”¹⁶. The administrative unit of Syria was at the time constituted by Lebanon, Syria, Israel, the Gaza Strip, the West Bank and Jordan. This unit was also called Greater Syria and was divided into three provinces (Vilayets) and two independent districts (Sanjaqs). The Sanjaqs were Lebanon and the district of

¹⁵ See note 11.

¹⁶ Lewis, Bernard: *The Middle East*, Phoenix Press, London, 2000, p 347.

Jerusalem, which constituted most of southern Palestine¹⁷. To fully understand the events that took place during the creation of the British Mandate of Palestine, we will have to look further into the near history previous to this event.

The Husain-McMahon correspondence

As mentioned before, the British Empire looked desperately for support during the First World War. Since the Ottoman Empire had joined forces with Germany and Austria a revolt against the Ottomans was crucial. The British High Commissioner, Sir Henry McMahon, addressed the Sherif of Mecca, Sharif Husain¹⁸, promising Arab independence in case the Arabs helped to overthrow the Ottomans. This was done by a series of letters, known as the Husain-McMahon correspondence¹⁹, which took place in 1915-1916.

The motives for the Arabs was clearly to re-establish the Muslim Empire or Arab nation from the days of the prophet Mohammed, when the Arab nation stretched from modern days Morocco to Iran and from Sudan to Turkey and half of Spain. This was expressed in the correspondence by Husain, who demanded “independence of the Arab countries”²⁰, which included Palestine. McMahon accepted this on behalf of Britain.²¹

The military significance of a few thousand Bedouin irregulars, in battles involving vast regular armies, may have been minor, but the moral significance of any Arab army fighting against the Turks and, still more, of the ruler of the holy places denouncing the Ottoman Sultan and his so called jihad, was immense, and was of particular value to the British and incidentally also to the French empires in maintaining their authority over their Muslim subjects.²²

¹⁷ Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, pp 159-162.

¹⁸ In regards to Sharif Husain one must remember that he was at the time, keeper of the two holiest cities in Islam and as such held an enormous religious authority. Though he lacked real political power he could in this regard act as representative of the Arab people. The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 2.

¹⁹ *Ibid.*, p 3.

²⁰ *Ibid.*, p 4.

²¹ “Great Britain is prepared to recognize and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca”, *Ibid.*, p 4.

²² Lewis, Bernard: *The Middle East*, Phoenix Press, London, 2000, p 341.

After the war ended the British still held the official policy that the Arabs were entitled to form an Arab nation, but there were other interests colliding with the Arab aims, namely the Sykes-Picot agreement and of course the Balfour declaration.

The Sykes-Picot agreement

In 1916, during the Husain-McMahon correspondence, there had been a secret agreement between France and Britain dividing the Middle East into spheres of interest after the war.

Under this arrangement, France was to have authority in coastal and northern regions of Syria, and Britain in Iraq, Transjordan, and the port cities of Haifa and Acre. Parts of Palestine were to be placed under an international administration, the form of which is to be decided upon after consultation with Russia, and subsequently in consultation with the other Allies, and the representatives of the Sherif of Mecca.²³

Following the Russian revolution the Bolsheviks renounced the agreement in 1917, and the “secret” agreement became public, causing great concern among the Arab allies. Britain then reaffirmed her promises to the Sherif of Mecca in two telegrams, stating that the agreement was not a formal treaty and was only made to eliminate possible tensions between France and Britain. The Arabs remained allies to Britain as they thought they would gain independence as stated in the Husain-McMahon correspondence. To their surprise another secret promise had been made, namely the Balfour declaration.

The Balfour declaration

In November of 1917 the Balfour declaration stated that the British government viewed the Zionist strife for a National home most favourably. The declaration is merely a letter from the British Foreign Secretary, Sir Arthur James Balfour, to the head of the Jewish community in Britain at the time, Lord Rothschild. As mentioned before Britain was in almost desperate need for support, both military and financially during the

²³ Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p 148.

course of the First World War. Britain sought the support of the Jews of both Russia and the United States. The aim was to force Germany to fight on a new, Russian, front and to gain military and financial support from the United States. The idea was that the Jewish communities of Russia and the United States would pressure their governments to contribute to the British war effort. It was believed that the Jews, particularly in the United States, were influential and that even the non-Zionist Jews of America would support them due to Britain's concern of their coreligionists²⁴. The declaration as such stated:

*Foreign Office,
2 November 1917*

Dear Lord Rothschild,

I have much pleasure in conveying to you on behalf of His Majesty's Government the following declaration of sympathy with Jewish Zionist aspirations, which has been submitted to and approved by the Cabinet:

'His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country.'

I should be grateful if you would bring this declaration to the knowledge of the Zionist Federation.

*Yours sincerely,
Arthur James Balfour.²⁵*

The idea of a National home for the Jews began in the latter part of the nineteenth century with the publication of “Der Judenstaat” (The Jewish State) in 1896 by Theodore Herzl. Herzl is considered to be the father of the Zionist movement; he was influenced by the many nationalist aspirations in Europe during the later part of the nineteenth century, and of course by the Russian pogroms and the growing anti-

²⁴ Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p 149.

²⁵ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 5.

Semitism in Europe. At first the place of the National home²⁶ was subordinated the creation of the state, but during the first Zionist Congress in Basel it was declared that the goal was to “create for the Jewish people a home in Palestine secured by public law”²⁷. Apart from the immediate war support, Britain had long term strategic interests in the region regarding Egypt and India. At the time India was the Crown Colony, and the trade with India through the Suez Canal in Egypt was of great importance to Britain. The Zionist recognized this and the

Zionist leaders stressed the strategic advantages to Britain of a Jewish State in Palestine. In a letter written in 1914 to a sympathizer, Weizmann²⁸ said: "... should Palestine fall within the British sphere of influence, and should Britain encourage a Jewish settlement there, as a British dependency, we could have in 20 to 30 years a million Jews out there - perhaps more; they would ... form a very effective guard for the Suez Canal."^{29, 30}

The Zionists had, while writing the declaration, suggested that the term “the national home” was used instead of “a national home”, which is slightly more vague. They had, in their proposals regarding the declaration, mentioned nothing of the rights of the indigenous people³¹, i.e. the Muslim and Christian communities of Palestine which comprised 90 percent of the population and owned 97 percent of the land.³² The wording “...non-Jewish communities in Palestine...” in the declaration is, in this light, quite peculiar.

It is hard to say what Britain had in mind issuing this declaration, since it contravened previous agreements – i.e. the Husain-McMahon correspondence and even to some extent the Sykes-Picot agreement, where the aim of the French counterparts was to

²⁶ “Herzl mentioned Palestine and Argentina...”. Ibid., p 6.

²⁷ Ibid., p 6.

²⁸ Dr. Chaim Weizmann became head of the Zionist movement after Theodore Herzl.

²⁹ Weizmann, Chaim, *Trial and Error*, Harper, New York, 1949, pp. 177-178 in Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 8.

³⁰ Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 8.

³¹ Cattani, Henry: *Palestine and International Law*, Longman Group Ltd, London, 1973, p 12 in Tunbjær, Noha: *The United Nations – From the Vantage Point of the Palestine Question*, Master thesis, Lund, 2004, p 9.

³² Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 11.

make most parts of Palestine subject to international administration.³³ But eventually the war came to an end “...by means of U.S. military intervention into the war...”³⁴, and Britain stood on the victorious side. The Mandatory system, which came into force in the years following the end of the First World War, eventually resulted in the creation of new Arab states – but not in the case of Palestine, which, at the end of Britain’s unilateral ending of the mandate, were to be divided into an Arab and a Jewish state according to United Nation General Assembly Resolution 181 of 1947.

The League of Nations and the formation of the Mandate of Palestine

The victorious nations of the First World War incorporated the League of Nations, which was a body *sui generis*, following the devastation of the First World War. The world community had to establish an organ in which they, at an early stage, peacefully could settle their disputes. Consequently the League of Nations was founded in 1919 by the signing of the Covenant of the League of Nations.³⁵ Prior to the League of Nations the usual conduct by victorious nations was to divide the conquered area among them to expand the Empires. This was not to be the case in the aftermath of the First World War. President Wilson of the United States secured this in the Fourteen Points Address, in which he sought to prevent history from repeating itself by granting the right of national self-determination to the conquered territories, especially in Europe. President Wilson thought that the denial of national self-determination had been responsible for the Great War in the first place³⁶; thus, to preserve peace, it was crucial for the people in the “newly liberated territories”³⁷ to govern themselves.

The territories situated in Europe quickly became independent states, but for other areas in the Middle East, Africa and the Far East this process was to take some time under the mandate system stated in article 22 of the Covenant of the League of Nations.³⁸ The timeframe for becoming independent was based on the level of development of the nation, and the mandates awarded were known as class A to C, whereas A represented

³³ Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p 148.

³⁴ Boyle, Francis A.: *Palestine, Palestinians and International Law*, Clarity Press Inc, Atlanta, 2003, p. 26.

³⁵ Wallace, Rebecca M. M.: *International Law*, Sweet & Maxwell, London, 1992, p. 242.

³⁶ Boyle, Francis A.: *Palestine, Palestinians and International Law*, Clarity Press Inc, Atlanta, 2003, p. 26.

³⁷ *Ibid.*, p 26.

³⁸ Appendix III

the highest level of development, upon which independence would soon be granted. The Mandate of Palestine and Transjordan was a class A mandate. Article 22 (IV) of the Covenant reads as follows:

Certain communities formerly belonging to the Turkish empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.³⁹

This could actually be interpreted as if though Palestine had already been provisionally recognized as an independent nation as a matter of positive international law.⁴⁰

The Mandate of Palestine and Transjordan was awarded to Great Britain at the San Remo conference in Italy in 1920, and was ratified by the League of Nations in July 1922.⁴¹

The mandate actually incorporated the Balfour declaration in Article 2 of the Mandate for Palestine, which reads:

The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.⁴²

If the text of the Balfour declaration is compared with the text of the Mandate, the text of the former reads “a national home”, while the latter reads “*the* national home”,

³⁹ Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 74.

⁴⁰ Boyle, Francis A.: *Palestine, Palestinians and International Law*, Clarity Press Inc, Atlanta, 2003, p. 31.

⁴¹ Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p 164.

⁴² Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 76.

which has a slightly stronger meaning and leaves little or no space for misinterpretation about the location of the national home.

Nevertheless the Palestinians were driven from their birth land *en masse* before and during the events that led to the creation of the State of Israel in May the 14th, 1948. During the course of the mandate there were occasionally riots and revolts orchestrated by the Arabs opposing the increasing Jewish immigration that found shelter under the British authorities. The Arab opposition eventually led to restrictions in immigration, and the territories of the mandate forming Transjordan were closed for Jewish settlement. The Jewish community was no better than their Arab neighbours and resorted to apartheid regarding labour⁴³, and to acts of terror towards both the Arabs and the British.

Eventually the British administration came to the conclusion that maybe the two peoples would be better off living in separate states, and came up with various suggestions of partition.

The British Peel Commission recommended that Mandate Palestine be partitioned into a small Jewish state ... and a large Arab state – the rest of Palestine united with Transjordan. Jerusalem, Bethlehem and a few other areas would remain a British Mandate zone.⁴⁴ (See appendix II; for another partition plan, called the Woodhead Commission, see appendix IV.)

The Arab leadership of the time, headed by Hajj Amin al Husseini, the Grand Mufti of Jerusalem and Head of the Supreme Muslim Council, forcefully rejected the partition plan, since they had no interest in giving away what they had been promised in the Husain-McMahon correspondence which had guaranteed independence for the Arab states. On the same grounds they rejected other plans of partition, like the UN plan of 1947.

⁴³ “A strict policy of what in today’s terms would be described as racial discrimination was maintained by the Zionist Organization in this rapid advance towards the “national home”. Only Jewish labour could service Jewish farms and settlements.” Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 31.

⁴⁴ Ma’oz, Moshe, *The UN Partition Resolution of 1947: Why Was it Not Implemented?*, Palestine-Israel Journal, vol. 9, no. 4, 2002, p 15.

The UN partition plan

After the Second World War Britain decided to unilaterally end the Mandate and throw the question of Palestine into the lap of the United Nations. Palestine had lost most of its strategic value since it was no longer needed to safeguard the Suez Canal – Britain had lost its aforementioned Crown Colony, India, to independence in 1946. Oil and natural gas was becoming of greater importance, but Britain’s interest in this matter was focused on Iran, with the large concession granted to Britain by the Shah of Persia at the beginning of the twentieth century.⁴⁵ The ongoing military operation of preventing East European Jewry from illegally entering Palestine grew harder by the minute. There was a wave of immigrants that could not return to their places of origin in East Europe, since nothing but hardship and hostility met them there. Britain tried by all possible means to hold this human tide back, but it was a struggle that could not be won. Perhaps Britain figured that Palestine was more of a problem since oil had not been found in this land⁴⁶, and the troops bound in Palestine to secure stability could be needed elsewhere. “On 2 April 1947 the British government announced that it would return to the United Nations the mandate which it had received...and would relinquish the Palestine Mandate.”⁴⁷

Following the terrible crimes of the Nazi Holocaust the world was now in support of the Jewish request for a homeland where they could live in peace and security. As previously mentioned there had been several suggestions about the place of the Jewish national home, even such a remote location as the British East Africa colonies was considered⁴⁸, but the Zionist Organisation had come to the conclusion that Palestine was to be preferred. The Jewish need for a sanctuary was beyond doubt, but the question at hand was: had the United Nations the competence needed for such a

⁴⁵ Lewis, Bernard: *The Middle East*, Phoenix Press, London, 2000, p. 352.

⁴⁶ In the spring of 2000 a large concession regarding natural gas was actually granted to a British company to exert natural gas from a finding right outside the coast of Gaza. This would have given the Palestinians a large independence concerning electricity, heating and cooking. The American company Enron was actually building a power plant in Gaza and other power plants were planned in the West Bank to secure electrical independence from Israel apart from having a safe supply of gas for heating and cooking (I have never even once encountered an electrical stove in Palestine and many Palestinians uses gas heaters during winter). The power grid of Gaza was to be modernized in a first phase and later on the grid of the West Bank. There were even plans for setting up grids for exportation of electricity to Egypt and Jordan. In the fall of 2000 I was part of the team at Al-Zaeem & Associates in Gaza who competed for the World Bank contract of the power grid in Gaza together with an Irish and a Jordanian company.

⁴⁷ Lewis, Bernard: *The Middle East*, Phoenix Press, London, 2000, p. 362.

⁴⁸ Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p. 47.

resolution? Some scholars would undoubtedly say no, such as Henry Cattán, while others are vaguer in their comments.

The United Nations had ascended as the world forum or, the “town meeting of the world”⁴⁹, after the Second World War. As such it had replaced the defunct League of Nations which quite obviously had not prevented war from occurring. The United States stood once again at the side of the victorious nations, as it had after the First World War, but at that time it had not taken part in the international community in the League of Nations. This time I would suppose that the United States wanted to take a more active part in the on goings of the world. The United Nations was established in 1945 and, in line with my thoughts, headquartered in New York. The United States was and is centre of world Jewry. Since Britain was to turn over the problem of its Palestine Mandate to this newly established organisation there was a tremendous amount of political pressure invested in the support of the partition plan. Right after Britain had expressed its intentions about the mandate, the UN had come up with two different solutions. The first was a “Federal State solution”⁵⁰, which suggested an Arab state and a Jewish state, with Jerusalem as capital of a confederation between the states as well as of the separate states. The second was the partition plan which later became the chosen alternative and resulted in UN General Assembly Resolution 181 of 1947. These solutions had been worked out by the United Nations Special Committee on Palestine, (UNSCOP), and the first suggestion was the minority proposal and the latter the majority proposal. The resolution had to be passed in the General Assembly with two thirds majority and the Zionist Organisation, who was in favour of the resolution since it gave the Jews control of 55 per cent of Palestine compared to 5.6 per cent prior to the resolution, used whatever political influence they had to pressure uncertain states to vote in favour of the resolution. This was made through the United States government which put pressure on Haiti, Liberia, the Philippines, China, Ethiopia and Greece, of whom all but Greece later voted in favour of the resolution or abstained.⁵¹ The resolution was passed with the needed majority on November 29, 1947.

⁴⁹ Yearbook of the United Nations, 1946-47, p. 51, in Tunbjer, Noha: *The United Nations – From the Vantage Point of the Palestine Question*, Master thesis, Lund, 2004, p. 41.

⁵⁰ Ma’oz, Moshe: *The UN Partition Resolution of 1947: Why Was it Not Implemented?*, Palestine-Israel Journal, vol. 9, no. 4, 2002, p. 21.

⁵¹ Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p. 261.

Even though the League of Nations, who had granted the Mandate of Palestine to Britain, had been superseded by the United Nations following the Second World War, the actual mandate survived through the conservative clause 80 (I) of the charter of the United Nations which states:

Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.⁵²

This would, in my opinion, lead to the conclusion that the Palestinians and the people living in Palestine at the time, who had been granted citizenship according to the provisions in the treaty of the mandate, had the right to self-determination which they in this way were denied. Palestine had been provisionally recognized as an independent state according to Article 22 (IV) of the Covenant of the League of Nations⁵³, and should as such have become an independent state upon the termination of the mandate.

The General Assembly have the power to discuss any matter within the competence of the United Nations and to make recommendations on any such matter. This competence is given the General Assembly in the charter of the United Nations, Article 10. The General Assembly, which is constituted by all the member states of the United Nations, has legal competence when it comes to admission of new states (Article 4 of the charter), but in other matters the competence is restricted to make recommendations – and even that power is restricted, in Article 12 of the charter, in case of dispute or situations that endangers world peace. This easily gives the impression that the General Assembly is of more political character than legislative, and given the fact that recommendations as such do not constitute legal obligations by their very nature, one could without difficulty question the legality of General Assembly resolution 181 of 1947.

⁵² United Nations Charter Article 80 paragraph 1 in Boyle, Francis A.: *Palestine, Palestinians and International Law*, Clarity Press Inc, Atlanta, 2003, p 28.

⁵³ See appendix III.

Palestine was not a member of the United Nations in 1947 and therefore the General Assembly had no competence when it comes to decisions regarding Palestine. The General Assembly has competence when it comes to matters *within* the competence of the United Nations, and since Palestine was not part of the United Nations, the General Assembly simply lacked competence in this matter. Palestine at that time belonged to its inhabitants, not to the United Nations. Nevertheless, even if the General Assembly did have competence in this matter, the United Nations as an organization, while regarding non-self-governing territories and mandated areas, is bound “to promote to the utmost ... the well-being of the inhabitants of these territories”⁵⁴ and “take due account of the political aspirations of the peoples”.⁵⁵ Since a vast majority of the people living in Palestine at the time was against any suggestion of partition, the General Assembly Resolution 181 of 1947 cannot be said to be in accord with the charter of the United Nations, and contradicts “the principle of equal rights and self-determination of peoples”⁵⁶, which besides acting “in conformity with the principles of justice and international law”⁵⁷ are the very fundament of the whole organization.

As mentioned before the Resolution was passed with the necessary majority. The withdrawal of the British troops and termination of the mandate in Palestine were set on the 15th of May 1948. The day before the termination of the mandate, the Jews proclaimed the state of Israel and war immediately broke out. There had been clashes between Arabs and Jews from the moment the Resolution was passed on November the 30th 1947. The political leadership of the Jews in Palestine, the Yishuv⁵⁸, with its illegal military branch Haganah, commanded by David Ben Gurion, accepted the Resolution, but as independence was declared the following year the clashes rapidly escalated into full scale war. This war is described by the Jewish community as the War of Independence and by the Palestinians as “al-Nakba”, the disaster. The Jewish forces,

⁵⁴ United Nations Charter, Article 73.

⁵⁵ Ibid.

⁵⁶ United Nations Charter, Article 1 (II).

⁵⁷ Ibid., Article 1.

⁵⁸ “It had what almost amounted to its own government in the form of the Jewish Agency.” Yapp, M. E.: *The Near East since the First World War*, Longman, Singapore, 1991, p 118. See further Article 4 of The Mandate for Palestine “An appropriate Jewish agency shall be recognized as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration, to assist and take part in the development of the country.”

the Haganah⁵⁹, “trained by Major Orde Wingate, a serving British officer”⁶⁰, were well equipped and trained but outnumbered by their Arab counterparts, which in turn were not so well trained or equipped. The Arab forces consisted mostly of Palestinians, but there were also volunteers from neighbouring countries, commanded by regular army officers. After the proclamation of the state of Israel, Egypt, Jordan, Syria and Lebanon launched attacks on the newly created state, at such odds the whole existence of the state was threatened. But at the end of 1948 the Israelis had pushed the aggressors back and captured roughly half the territory set for the Palestinian state⁶¹ and created about 700.000 Palestinian refugees who had fled their homes in Israel and the territory captured.⁶² The Palestinian refugees are in United Nations General Assembly resolution 194 (III) of 11 December 1948 accorded the right of return. Paragraph 11 of the resolution resolved “That the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those not choosing to return.” An armistice was negotiated in 1949 (see appendix I) and the war ended, leaving the Palestinians with 22 per cent of the area of the historical Palestine, and Egyptian control over the Gaza Strip and Jordanian in the West Bank.

The War of 1967

“The impact of the war of June 1967 cannot be overstated.”⁶³ Egypt never made any territorial claims to the area they captured in 1948, and even if they had it is not likely they would have had any success in such claims, since Jordan’s⁶⁴ annexation of the

⁵⁹ The Irgun and the Stern Group were two Jewish terror organizations which also participated in the war and had performed attacks on both British and Palestinian interests prior to the war of 1948, see further Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p 256.

⁶⁰ Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 39.

⁶¹ “King Abdullah of Transjordan made a secret agreement with Israelis prior to the outbreak of hostilities in 1947 to the effect that his troops would occupy the areas awarded to the Palestinians in the partition plan but would not attack Jewish positions. While Abdullah kept his side of the agreement, the Israelis did not keep theirs, seizing by force of arms portions of the Arab territory.” Bill, James A., and Springborg, Robert: *Politics in the Middle East 4th ed.*, HarperCollins College Publishers, New York, 1994, pp 310-311.

⁶² Bill, James A., and Springborg, Robert: *Politics in the Middle East 4th ed.*, HarperCollins College Publishers, New York, 1994, p 308.

⁶³ Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p 399.

⁶⁴ Jordan offered citizenship to all Palestinians living in the West Bank, Yapp, M. E.: *The Near East since the First World War*, Longman, Singapore, 1991, p 293.

West Bank were only recognized by Great Britain and Pakistan⁶⁵. But Egypt and Jordan administered the territories, leaving Palestine of today with a very peculiar and interesting legal situation. Jurisdiction in Palestine of today is a mix or blend of Ottoman, British Mandate, Jordanian and Egyptian law, added by a vast number of Israeli military orders inflicted upon the Palestinians after the occupation of both the Gaza Strip and the West Bank in 1967.

The war of 1967, also called the Six-Day War or the June War, broke out on the 5th of June. This was a war of both profane and sacral reasons. The Egyptians had closed the Gulf of Aqaba for Israeli vessels, and for vessels transporting military goods to and from Israel through the port of Eilat, which is situated in southern Israel and is Israel's natural trade route for the Red Sea and beyond. This water is also of great concern in the Middle East as a whole, and has probably been so since the dawn of time. Most of the water resources found in historical Palestine emanates from the West Bank and the Jordan River. The Jews are in the Bible predestined to make the desert bloom, and in order for that to happen you need water. As the population grew in Israel water shortage was at hand. Jordan on the other hand had experienced a continuous boom in the economy due to the development of agriculture "notably by irrigation of the Jordan valley"⁶⁶, and was not interested in sharing the resources of the Jordan River; "the result was the 1967 war, a war for the control of water resources ... The war did not come as a surprise."⁶⁷

As war broke out the Israel Defence Forces (IDF) within days captured the Gaza Strip and the Sinai Peninsula from Egypt, the West Bank including East Jerusalem from Jordan and the Golan Heights from Syria. Subsequent to the occupation Israel almost immediately gave East Jerusalem a different legal status than the rest of the territories occupied⁶⁸, and "following the IDF's capture of East Jerusalem in June 1967, thousands of Jews from West Jerusalem and elsewhere in Israel rushed to the Western Wall,

⁶⁵ Ginbar, Yuval: *Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects*, B'Tselem, Jerusalem, 1997, p 4.

⁶⁶ Yapp, M. E.: *The Near East since the First World War*, Longman, Singapore, 1991, p 292.

⁶⁷ Bailey, Sydney D: *The Making of Resolution 242*, Martinus Nijhoff Publishers, 1995 pp 7-13 in Tunbjer, Noha: *The United Nations – From the Vantage Point of the Palestine Question*, Master thesis, Lund, 2004, p 50.

⁶⁸ This can be seen today by the colour of the wrapping of the Palestinians identity cards. Blue for East Jerusalem, Green for the West Bank and Red for the Gaza Strip. Besides this the West Bank is called Judea and Samaria in Israeli rhetoric since this excludes East Jerusalem.

celebrating their first opportunity in nineteen years to pray at Judaism's holiest site."⁶⁹ Even though the reasons for the war can be hard to terminate, or as Bernard Lewis puts it: "...it seems that the participants were like characters in a Greek tragedy, in which at every stage the various actors had no choice but to take the next step on the path to war."⁷⁰, the most important issue for this thesis is that East Jerusalem, the West Bank and the Gaza Strip were *de facto* occupied in 1967, and to a large extent still are. The war of 1967 led the United Nations to respond to the conflict in the form of United Nations Security Council resolution 242 of 22 November 1967 demanding in paragraph 1. (I)" Withdrawal of Israeli armed forces from territories occupied in the recent conflict;" and in paragraph 1. (II):

Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

During the formation of the resolution there were much bickering in regards to the wording. Israel, which had become member of the UN in 1949⁷¹, could not accept the Arab states demand for "*all* territories", or "*the* territories" in paragraph 1 (I). The final resolution was negotiated by the British diplomat Lord Caradon, and was passed unanimously by the Security Council after the United States had informed that she would not support the resolution if any changes were made.⁷² Ever since its adoption Resolution 242 of 1967 has been a corner stone in the peace negotiations between Israelis and Palestinians.

Applicability of International Humanitarian Conventions to the Occupied Territories

There are a number of International Conventions regarding Humanitarian rights in the world, and most states are signatories to them. They would as it seems apply to the situation in the Occupied Territories, but not all agree on this even though a vast

⁶⁹ Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p 403.

⁷⁰ Lewis, Bernard: *The Middle East*, Phoenix Press, London, 2000, p 364.

⁷¹ United Nations General Assembly Resolution 273 (III) of 11 May 1949.

⁷² Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, p 419.

majority of the International Community does. A study of the applicability of the conventions relevant to this study, and of these arguments, will follow. In this passage an analysis of the most common and well known protections of Human Rights will follow. Other instruments for the protection of Human Rights will be analyzed as they occur and apply to the matter; the Israeli position, however, is that most of them do not apply to the Occupied Territories and if they do they are not justiciable. The instruments are presented as matter of internationally recognized importance and weight.

The Fourth Geneva Convention of 1949

The Fourth Geneva Convention of 1949 may be considered as the expression of the international community's sense of revulsion at the treatment accorded to the Jews who came under the Nazi regime during time of war and occupation and who were subjected to indignities, abuses and deprivations in gross denial of human rights.

Since the adoption of that Convention the irony of history has made the June 1967 war between Israel and neighbouring Arab countries, and the aftermath of that war, the first occasion on which the value of the Convention itself and the genuineness of individual nations' adherence to it could be put to the test...⁷³

The Fourth Geneva Convention (Geneva IV) aims at protecting people and their property in time of war. "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."⁷⁴

⁷³ UN Document A/8089, paras 41 and 42 in Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The Question of the Observance of the Fourth Geneva Convention of 1949 in Gaza and the West Bank including Jerusalem Occupied by Israel in June 1967*, United Nations, New York, 1979, p 1.

⁷⁴ Article 4, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

The Geneva (IV) convention was ratified by Israel on January 6 1952, but Israel is not party to the 1977 additional Protocols I and II relating to the protection of victims of international and non-international armed conflicts.⁷⁵

On 14 June 1989, the Palestinian Ambassador to the United Nations in Geneva deposited the Instrument of Accession to the Four Geneva Conventions of 1949 and their two Additional Protocols of 1977 on behalf of the State of Palestine with the Swiss Federal Council – the Swiss government being the depositary for the Geneva Conventions and Protocols ... [T]he United States government immediately applied enormous diplomatic and political pressure upon the Swiss government to reject Palestine’s Instrument of Accession ... Here was a major diplomatic initiative... intended to be purely humanitarian by nature – to protect innocent human lives on both sides of this conflict... the United States government went all out to successfully sabotage it.⁷⁶

As for the applicability of Geneva (IV) to the Occupied Territories, Israel’s position is that the Convention is indeed applicable but that Israeli courts lack jurisdiction⁷⁷ since the Convention is not yet adopted by the Israeli parliament, the Knesset, and therefore not considered part of municipal law.⁷⁸ Besides this Israel does not consider itself as an ‘occupying power’ in the meaning of the words in Article 4 of the Convention since Egypt and Jordan did not have sovereignty over the territories occupied by Israel in 1967⁷⁹, and “Israel appears to believe that by accepting that the convention is applicable it will be recognizing the sovereignty of Jordan and Egypt...”⁸⁰ This

⁷⁵ Ginbar, Yuval: *Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects*, B’Tselem, 1997, p 6.

⁷⁶ Boyle, Francis A.: *Palestine, Palestinians and International Law*, Clarity Press Inc, Atlanta, 2003, p. 20.

⁷⁷ “It is wrong to think... that the Geneva Convention is not applicable to Judea and Samaria. It applies, but it... is not justiciable in this court.” H CJ 390/79, ‘Azat Mahmud Mustafa Dweikat et al v. State of Israel et al, Piskei Din 34(1) 1, 29 (hereafter: *Elon Moreh*) in *Ibid.*, note 14, pp 6-7.

⁷⁸ *Ibid.*, p 5. & Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The Question of the Observance of the Fourth Geneva Convention of 1949 in Gaza and the West Bank including Jerusalem Occupied by Israel in June 1967*, United Nations, New York, 1979, p 6.

⁷⁹ “Having regard to the consideration that Israel acted defensively in 1948 and 1967, and her Arab neighbours acted aggressively in 1948 and 1967, Israel has better title in the territory of what was Palestine than do Jordan and Egypt.” Professor Yehuda Blum of the Hebrew University, Jerusalem in Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The Question of the Observance of the Fourth Geneva Convention of 1949 in Gaza and the West Bank including Jerusalem Occupied by Israel in June 1967*, United Nations, New York, 1979, p 5.

⁸⁰ Oyediran, Joanna: *Plunder, Destruction and Despoliation: an Analysis of Israel’s Violations of the International Law of Cultural Property in the Occupied West Bank and Gaza Strip*, Al-Haq, Ramallah, 1997, p 25.

interpretation of the convention is based on the idea that the convention is an instrument for protection of sovereign states rights vis-à-vis one another⁸¹, not an instrument for the protection of peoples and persons. Nevertheless Israel has agreed to comply with the “humanitarian provisions”⁸² of Geneva (IV), which in practice leads to the facts that Article 49 of the Convention⁸³, regarding Israeli settlements, is not applicable from an Israeli point of view. This was established in the Israeli High Court of Justice in 1978 in the so called Beit El case.⁸⁴

[T]he government of Israel distinguishes between the legal problem of the applicability of the Fourth Geneva Convention to the territories under consideration, which... does not in my opinion apply to these territories, and decided to act *de facto* in accordance with the humanitarian provisions of the Convention.⁸⁵

Israel does not accept the Geneva Convention *de jure* but claims to carry out its humanitarian provisions *de facto*. “The position is false, however; deportations, collective punishments, house demolitions, and the establishment of settlements all violate the humanitarian provisions of the Convention.”⁸⁶ The view of the international community is quite clear; the convention applies and should be respected in full by the belligerent occupier Israel. This point has been stressed several times by the International Committee of the Red Cross, the United Nations and various non-governmental organisations such as Amnesty International. Their stand point can be summed up in the words of the Human Rights Organisation B’Tselem: “Humanitarian

⁸¹ “...armed conflict which may arise *between* two or more of the *High Contracting Parties*... [my emphasis]” Article 2, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

⁸² Ginbar, Yuval: *Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects*, B’Tselem, 1997, p 7.

⁸³ “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” Article 49, paragraph 6, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

⁸⁴ “Arguments based on article 49 of the Geneva Convention may not be raised in this court.” HCJ 606, 610/78, *Suleiman Tawfiq Ayyub et al v. Minister of Defence et al*, Piskei Din 33 (2) pp. 122-123 (hereafter: *Beit El*) in Ginbar, Yuval: *Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects*, B’Tselem, 1997, p. 5.

⁸⁵ Meir Shamgar in Shehadeh, Raja: *Occupier’s Law Israel and the West Bank Rev. ed.*, John D. Lucas Printing Company, Baltimore, 1988, p. xiii.

⁸⁶ *Ibid.*, p. xiii.

law, including the Fourth Geneva Convention, is, by definition and nature, entirely humanitarian.”⁸⁷

The IV Hague Convention of 1907 with Regulations

Ironically in the aforementioned Beit El case the Israeli High Court of Justice ruled that the Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (the Hague Regulations), should apply to the matter. The court considered the Regulations as part of customary international law and as such “‘automatically’ considered part of municipal law.”⁸⁸ As mentioned above the Knesset had not adopted the Geneva (IV) and it was therefore not part of municipal law, but in regards to the Hague Regulations of 1907 this was not necessary. The difference in the view of the Israeli High Court of Justice is that Geneva (IV) is considered as belonging to treaty-based law, not customary international law.

Even though Israel has found that the Hague Regulations apply to the occupation, it has interpreted important articles of the Convention very narrowly, i.e. Article 43, which reads:

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.

Raja Shehadeh, a Palestinian lawyer, comments:

Article 43 makes clear that the occupying power is severely restricted in its power to change the laws in force in the Occupied Territories, Israel has implemented ... extensive changes ... and argues that the prohibition is tempered by the phrase ‘unless absolutely prevented’.⁸⁹

⁸⁷ Ginbar, Yuval: *Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects*, B’Tselem, 1997, p. 7.

⁸⁸ *Ibid.*, p. 5.

⁸⁹ Shehadeh, Raja: *Occupier’s Law Israel and the West Bank Rev. ed.*, John D. Lucas Printing Company, Baltimore, 1988, p. xiv.

The Hague Convention of 1954 and its Regulations

With the systematic pillage, looting and removal of cultural property in occupied territories by the Nazis during the Second World War in fresh memory, the international community recognized the need for the establishment of a treaty which dealt specifically with the protection of cultural property. In addition, many cultural treasures were lost during this period by aerial bombardment by both Axis and Allies. The treaty is based on the idea that cultural property is not only the concern of the state in question but a matter of concern to all states. Cultural property has in this sense become universal. "The treaty is founded on the twin concepts of 'safeguard' and 'respect'."⁹⁰ The treaty provides a comprehensive definition of cultural property and the objects obtaining protection and is very broad-ranging. Article 1 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, states:

For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

(a)

movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b)

buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

(c)

centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as "centres containing monuments"⁹¹.

⁹⁰ Oyediran, Joanna: *Plunder, Destruction and Despoliation: an Analysis of Israel's Violations of the International Law of Cultural Property in the Occupied West Bank and Gaza Strip*, Al-Haq, Ramallah, 1997, p. 13.

⁹¹ "[S]uch as the old quarters of certain cites, for example ... the Old City of Jerusalem." Ibid., p 14. After the Israeli capture of East Jerusalem in 1967 they immediately bulldozed the Moroccan quarter in East Jerusalem since it was situated next to the Western or Wailing Wall in order to make room for the Jewish worshippers.

Israel is a party to the Convention, ratified in 1957, and recognizes its applicability to the Occupied Territories, with the exception of East Jerusalem which was (illegally) annexed in 1967.

Al-Haq is the affiliate of the International Commission of Jurists in the West Bank. In a letter to al-Haq from the Israeli Ministry of Foreign Affairs, Department of International Treaties, of 28 July 1995 the representative writes:

Regarding your question whether Israel continues to regard the Hague Convention and Protocol of 1954 as being applicable to the Occupied Territories ... Israel has stated many times that it regards this convention as being applicable to the administered territories, and even issued [sic] a decree which instructed the military forces in the territories to act by the provisions of this Convention.⁹²

The Israeli High Court of Justice ruled in a case that construction on the petitioner's land would only be permissible if a Roman aqueduct was to be preserved.⁹³ The court found that the military administration of the West Bank was under obligation of customary international law to safeguard and preserve cultural and archaeological treasures in occupied territories.

Universal Declaration of Human Rights

On 10 December 1948 the United Nations General Assembly adopted the Universal Declaration of Human Right (UDHR), and encouraged all its members to announce the declaration publicly. As mentioned above Israel became a member of the United Nations in 1949 and should as such pay obligation to the charter of the United Nations, especially since Israel's admission to the United Nations followed "Israel's declaration that it 'unreservedly accepts the obligations of the United Nations Charter and undertakes to honor them from the day when it becomes a Member...'"⁹⁴ The Israeli position in regards to the UDHR, however, is that it is not applicable to the Occupied

⁹² Ibid., p 25.

⁹³ HJC 270/87, *Khalil Iskandar Shahin Kandu v. Minister of Defence*, Piskei Din 43 (2), pp. 738, 742 in Ibid., p. 27.

⁹⁴ Bevis, Linda: *The Applicability of Human Rights Law to Occupied Territories: The Case of the Occupied Palestinian Territories*, Al-Haq, Ramallah, 2003, p. 60.

Territories⁹⁵, even though it seems that the Israeli High Court of Justice has on more than one occasion considered it to constitute customary international law because its principles are “the heritage of all enlightened nations.”⁹⁶ There should actually be little bickering about the universal applicability of the UDHR since it provides the basic and minimum standards of Human Rights for a state at both peace and war. There is consensus considering this fact among the international community.

Every individual has a given right to participate in the cultural life of his or her society. Also, every individual is granted right to benefit from the cultural expressions of one’s society, be they past or present. The right to your own cultural heritage is granted through the UDHR, and in some way all peoples have a universal right to each other’s cultural heritage since culture is universal and humans are universal. This is in line with everyone’s right to identity and the right to form and shape your own identity, which cannot easily be done without a foundation to build on.

In the case of Palestinian culture and Palestinian archaeology there is a conflict of interest. Roughly speaking we have two peoples arguing about the right to the cultural heritage of the same piece of land. Before, and especially since, the creation of the state of Israel, there has been a call for justification for the Jews to expel the Palestinian population and create a Jewish state on the land that was held by Arabs. It was and is of utmost importance to legitimize the claim of “eternal and given right to the land of Israel”. Archaeology can in these matters provide an enormous help, but on the other hand it can also be of great disadvantage.

Intellectual Property and Human Rights

Following the growing importance of Intellectual Property Rights, the link between I.P. and Human Rights has been acknowledged. The main issue is article 27 of the Universal Declaration of Human Rights:

- (1) 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.

⁹⁵ Ibid., p 61.

⁹⁶ HJC 103/67, *The American-European Beth-El Mission*, Piskei Din 10 (3), p. 325 in Ibid., p. 61.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Intellectual Property Rights have in a short period of time and due to the irreversible globalization of the world economy amounted as one of the most important areas of law to protect for the industrialized nations, which can no longer compete in the global economy by means of labor or raw-material costs. On the other hand this has also led to the fact that developing countries and indigenous peoples around the world are in an even greater need for protection of their rights. “It is an empirical fact ... that intellectual property rights are universally recognized.”⁹⁷

Summary of International Standards in regards to Cultural Property during Armed Conflict

In the event of armed conflict the occupying power has to take into account the following obligations and constraints in the treatment of cultural property:

- Pillage of cultural property is prohibited and must be prevented (Hague Regulations of 1907, article 47; Fourth Geneva Convention of 1949, article 33; Hague Convention of 1954, article 4 (3)).
- Theft of cultural property by private individuals is prohibited and must be prevented (Hague Convention of 1954, article 4 (3)).
- Property of institutions dedicated to religion, charity and education, the arts and sciences, even if state-owned property is to be treated as private property (Hague Regulations of 1907, article 56).
- Seizure of institutions dedicated to religion, charity and education, the arts and sciences is prohibited (Hague Regulations of 1907, article 56).
- Destruction or damage of cultural property is prohibited (Hague Regulations of 1907, article 56; Fourth Geneva Convention of 1949 article 53; Hague Convention of 1954, article 4 (3)).
- The conduct of excavations, with the exception of salvage excavations, is prohibited (Hague Regulations of 1907, article 56; Fourth Geneva Convention of 1949, article 53; Hague Convention of 1954, article 4 (3)).
- States are prohibited from requisitioning movable cultural property (Hague Convention of 1954, article 4 (3)).
- Reprisals against cultural property are prohibited (Hague Convention of 1954, article 4 (3)).

⁹⁷ Drahos, Peter: *The Universality of Intellectual Property Rights: Origins and Development*, in WIPO / OHCHR: *Intellectual Property and Human Rights*, WIPO Publication, Geneva, 1999, p. 30.

- An occupying power must support the competent national authorities of occupied territory in safeguarding and preserving its cultural property (Hague Convention of 1954, article 5 (2)).
- An occupying power must take measures to preserve cultural property damaged by military operations in close cooperation with the national authorities (Hague Convention of 1954, article 5 (2)).
- An occupying power must prevent the export of cultural property from occupied territory (Hague Protocol of 1954, article 1).

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict defines cultural property as:

- movable or immovable property of great importance to the cultural heritage of every people, such as:
 - monuments of architecture, art or history, whether religious or secular;
 - archaeological sites, groups of buildings which are, as a whole, of historical or artistic interest;
 - works of art;
 - manuscripts, books, and other objects of artistic, historical or archaeological interest;
 - scientific collections and important collections of books or archives;
 - reproductions of the above property;
- buildings whose main and effective purpose is to preserve or exhibit movable cultural property, such as:
 - museums;
 - large libraries;
 - depositories of archives;
 - refuges intended to shelter other cultural property in the event of armed conflict;
- centres containing a large amount of cultural property, known as “centres containing monuments”.

This property is considered to be cultural property *irrespective* of its origin or ownership. Although the States Parties do not necessarily have to adopt it at the national level, this definition should nevertheless help promote understanding of the scope of the concept of cultural property, since it lists typical examples of cultural property worthy of protection. Historical and

contemporary audio-visual documents of the past thirty years, for example, could also be covered by a definition along those lines. [my emphasis]⁹⁸

Archaeology in Palestine

Various European countries have had a great interest in archaeology in the Middle East in general and in the Biblical land of Israel in particular, since it is the birthplace of Christ and Christianity. The expeditions started already during the crusades, where mostly young men from Europe went to Lebanon and Palestine to capture the holy city of Jerusalem from “the infidels”, the Muslims, and to find the Holy Grail. These expeditions were not much more than plunder raids and a way for nobles who were not the firstborn male to enrich themselves.⁹⁹ But there were of course also religious motives for the crusades; there are reports of the crusaders attacking the walls of Jerusalem with nothing else than their armour and swords.

This has little or nothing to do with archaeology, but during the period of the crusades numerous artefacts found their way to Europe in the form of war prey and relics. The crusaders captured Jerusalem in 1099 and established the kingdom of Jerusalem, which lasted almost 300 years and was a period of peace and prosperity

Archaeology before and during the Mandate of Palestine

In 1865 the Palestine Excavation Found was established and this was the beginning of modern archaeology in Palestine. The purpose of the fund was and is to explore the archaeological treasures of Biblical Palestine. The fund conducted a lot of excavations in Palestine and founded The British School of Archaeology in Jerusalem, which later formed the base for the Department of Antiquities during the British Mandate.¹⁰⁰ Prior to World War I, five foreign schools of archaeology operated in Jerusalem: French,

⁹⁸ Dutli, María Teresa in cooperation with Bourke Martignoni, Joanna and Gaudreau, Julie: *Protection of Cultural Property in the event of Armed Conflict*, International Committee of the Red Cross, Geneva, 2002, p. 147.

⁹⁹ Among nobles at this time only the firstborn male inherited the estate, at least this was the case in France from where many crusaders originated.

¹⁰⁰ “These two organizations occupied the same building until 1930, though already in 1926 the directorates were separated.” Glock, Albert: *Archaeology as Cultural Survival: The Future of the Palestinian Past*, Journal of Palestine Studies, vol. 23, no. 3, 1994, p. 75.

American, German, British and Italian.¹⁰¹ Palestine was at this time a province of the Ottoman Empire and “[p]ermission to excavate required a *firman* (decree) from the sultan in Istanbul.”¹⁰²

[T]he principle under which Turkish permits were issued were based on the sound principle ... that national monuments must not be removed from the country ... their possession must remain with the people of the country whose they are.¹⁰³

After the British capture of Palestine the special status of Palestine in regards to archaeology can be seen in Article 21 of the Mandate for Palestine and Transjordan, which states:

The Mandatory shall secure the enactment within twelve months from this date [24 July 1922], and shall ensure the execution of a Law of Antiquities based on the following rules. This law shall ensure equality of treatment in the matter of excavations and archaeological research to the nationals of all States Members of the League of Nations.

(1) "Antiquity" means any construction or any product of human activity earlier than the year 1700 A. D.

(2) The law for the protection of antiquities shall proceed by encouragement rather than by threat.

Any person who, having discovered an antiquity without being furnished with the authorization referred to in paragraph 5, reports the same to an official of the competent Department, shall be rewarded according to the value of the discovery.

(3) No antiquity may be disposed of except to the competent Department, unless this Department renounces the acquisition of any such antiquity.

No antiquity may leave the country without an export licence from the said Department.

(4) Any person who maliciously or negligently destroys or damages an antiquity shall be liable to a penalty to be fixed.

(5) No clearing of ground or digging with the object of finding antiquities shall be permitted, under penalty of fine, except to persons authorised by the competent Department.

¹⁰¹ "European nations, particularly England and France, explored their own cultural origins through the search for biblical connections while vying for position in the collapsing Ottoman Empire." Ibid., p. 72.

¹⁰² Ibid., p. 73.

¹⁰³ Macalister: *A Century of Excavation in Palestine*, p. 54. in Ibid., pp. 73-74.

(6) Equitable terms shall be fixed for expropriation, temporary or permanent, of lands which might be of historical or archaeological interest.

(7) Authorization to excavate shall only be granted to persons who show sufficient guarantees of archaeological experience. The Administration of Palestine shall not, in granting these authorizations, act in such a way as to exclude scholars of any nation without good grounds.

(8) The proceeds of excavations may be divided between the excavator and the competent Department in a proportion fixed by that Department. If division seems impossible for scientific reasons, the excavator shall receive a fair indemnity in lieu of a part of the find.

In the preamble, access to archaeology in Palestine is granted to “nationals of *all* States Member of the League of Nations [my emphasis]”¹⁰⁴. At this point in time most of the members of the League were Western European countries which would indicate the extensive interest in Palestine by the Christian community. According to the Anglo-American Committee of Inquiry, Palestine had been colonized “because of its ‘historic significance’ and the necessity of it being open to all religions.”¹⁰⁵ Remarkable findings were made and the Palestine Archaeological Museum was established. Excavations during the Mandatory period do not seem to have posed a threat to the rights of the Palestinians to their cultural heritage, since most of the findings remained in Palestine and were conducted in accordance with the Hague Regulations of 1907, which was the Human Rights instrument in position at the time.

Archaeology before the creation of the State of Israel

The creation of the Jewish State of Israel did not only manifest the creation of a state in the form of military activity and establishment of an administration and institutions. It also manifested the creation of a people. The State of Israel was intended to become the National Home of the Jews from all over the world. The vast majority of the Jewish people had been scattered around the world since the Diaspora in 70 AD, and in many cases, especially in the Arab countries in North Africa, lived peacefully and well integrated in their respective countries. The Jews are roughly divided into two

¹⁰⁴ The conditions of Article 21 of the Mandate were later transferred into the Antiquities Ordinance of 1929, but already in 1918 the British issued their first Ordinance regarding these matters.

¹⁰⁵ Anglo-American Committee: *Report of the Anglo-American Committee of Inquiry on Jewish Problems in Palestine and Europe*, London, 1946, p. 38. in Abu El-Haj, Nadia: *Producing (arti)facts: archaeology and power during the British mandate of Palestine*, Israel Studies, vol. 7, no. 2, 2002, p. 36.

categories: the Ashkenazi Jews, which originates from mostly Western Europe, and the Sephardic Jews from North Africa, Iraq, Iran and Ethiopia; the latter category is also called Oriental Jews. The Zionist movement, which led to the creation of Israel, were established by the Ashkenazi's in Western Europe, and the Ashkenazi's held and to a large extent still holds the most important positions in Jewish society.¹⁰⁶ As Zionism was importantly influenced by the nationalistic movements of late 19th century in Europe, among the things adopted by the Zionists was the idea of a national character. It was a matter of great national importance that the heterogeneous Jews were able to reconnect to the Biblical land of Israel, Eretz Israel, in order for them to re-establish themselves as a people in the land of their ancestors.

In 1914 The Jewish Palestine Exploration Society was founded by Nahum Slouschz. This was the start for organised Jewish archaeology in Palestine. “[S]ecular Zionists needed to ‘touch the antiquities of the land in order to connect with it’ ... archaeologists posited a natural connection between ancient objects and national persons.”¹⁰⁷ As described above, and as a nation with a majority of immigrants “archaeology emerged as a key national-cultural practice through which roots could be sought, national unity forged, and national cultural values disputed.”¹⁰⁸ Archaeology also had a significant role in the unification process of the Jewish community, a joint venture between the intellectuals and the people that worked the land in the Jewish settlements. The first excavation conducted by the Jewish Palestine Exploration Society took place in 1921-1922, at Hammath-Tiberias.¹⁰⁹ The Jewish Palestine Exploration Society held its first conference “Knowledge of the Land” in October 1943 and the head of the society at that time Itzhak Ben-Zvi pointed out that the

excavations at Tiberias had been carried out by ‘Jewish researchers and workers.’ Explaining that many who lived on agricultural settlements had

¹⁰⁶ Prior to 1948 the Oriental Jews did not immigrate to Israel in any significant numbers, but after the creation of the State of Israel hostilities began to arise towards them and most of them were forced to leave for Israel. This actually caused a problem in regards to the spoken Hebrew, as the pronunciation of the Oriental Jews was very far from the pronunciation of the Ashkenazi Elite. The Oriental Jews spoke Hebrew in a way that sounded almost Arabic, which seems reasonable since they are both Semitic languages and the Oriental Jews had only spoken Arabic and Hebrew for centuries. See further: Tessler, Mark: *A History of the Israeli-Palestinian Conflict*, Indiana University Press, 1994, pp. 29-31.

¹⁰⁷ Abu El-Haj, Nadia: *Producing (arti)facts: archaeology and power during the British mandate of Palestine*, Israel Studies, vol. 7, no. 2, 2002, p. 33.

¹⁰⁸ *Ibid.*, p. 34.

¹⁰⁹ Glock, Albert: *Archaeology as Cultural Survival: The Future of the Palestinian Past*, Journal of Palestine Studies, vol. 23, no. 3, 1994, p. 74.

pitched in to help with the work, Ben-Zvi noted that ‘collaboration between researchers and the Yishuv [pre-state community], between the past and the present’ had thus been created.¹¹⁰

Archaeology was most helpful in redefining and reconfiguring particular items

as artifacts, as objects of national significance and specific landscapes as historical locales ... and ... specific historical conceptions of Palestine as the Holy Land, as the Land of Israel – Eretz Yisrael.¹¹¹

A matter of great importance in this quest was fact collecting. Ancient names of excavated synagogues and tombs were gathered from all over Palestine. Everywhere signs of Jewishness, continuous in and dispersed across the land, were sought.¹¹² Each new finding produced a new dot on the map of Palestine, and the ancient name of the place in question were deciphered through linguistics and textual sources. “This material-symbolic (re)inscription of the land connected the dots not only in space but also through time.”¹¹³ Maps were produced with the names of ancient settlements, alongside with the Hebrew names of Arab towns and villages and contemporary settlements with no known connection to the past; “the homeland as a whole was given concrete and visible form.”¹¹⁴

In 1931 the British Mandatory Government published its official Transliterated Lists of Personal and Geographical Names for Use in Palestine. A dispute erupted between the authorities and the Jewish Palestine Exploration Society, which, in cooperation with the National Council of the Yishuv, submitted their own Memorandum on Method of Transliteration of Geographical and Personal Names. This list claimed to be based on “scientific observations, indices, and quotations from scientific authorities.”¹¹⁵ In contradiction to the Government’s lists no sources were cited, “linguistic claims were

¹¹⁰ Abu El-Haj, Nadia: *Producing (arti)facts: archaeology and power during the British mandate of Palestine*, Israel Studies, vol. 7, no. 2, 2002, p. 37.

¹¹¹ Ibid., p. 35.

¹¹² “This work had all the characteristics of butterfly-collecting, an amassing of sometimes inchoate data not limited to what would later be defined as archaeology, strictly speaking.” Ibid., p. 47.

¹¹³ Ibid., p. 48.

¹¹⁴ Ibid., p. 49.

¹¹⁵ Itzhak Ben-Zvi, *Memorandum on the Method of Transliteration of Geographical and Personal Names*, Jerusalem, 1932, p. 5-6. in Ibid., p. 50.

presented as scientifically, and thus, historically true.”¹¹⁶ In this sense the academic disciplines of archaeology and linguistics “was intrinsic to rendering true the ideological commitment that Jewish settlement in Palestine was a process, quite simply, of national return.”¹¹⁷

Archaeology in the newborn state

[T]he founders of the state were resolutely secular (some even anti-religious) in outlook the mainstream Zionist movement felt an ethnic connection to the rituals of eastern European Orthodoxy [the Mizrahi]. A Jewish state needed a Jewish component, and this was felt even more strongly after the Holocaust.¹¹⁸

With the creation of the state of Israel came the transformation of the Jewish Palestine Exploration Society into the Israel Exploration Society. The Department of Antiquities and the Palestine Archaeological Museum were lost, since they were situated in East Jerusalem and as such came under *de facto* Jordanian control following the war of 1948. A new Department of Antiquities, and new museums, were established under the Ministry of Education and Culture. Throughout the 1950s and 1960s archaeology, for some, continued to demonstrate a historical connection with the land of their ancestors, while for others it was a means of developing Israel’s modernist credentials. “Archaeology also performed an important function in the state of Israel’s foreign image, and foreign policy, showing the Jewish state in revival, investigating its past with the tools of science.”¹¹⁹

In the late 1960s the character of archaeology in Israel changed. The events that triggered this development were the victorious war of 1967 and the excavations at the fortress Masada (see above), where mass graves of what was thought to be Masada’s Jewish defenders were found.¹²⁰ As East Jerusalem was annexed the Palestine

¹¹⁶ Ibid., p. 51.

¹¹⁷ Ibid., p. 51.

¹¹⁸ Hallote, Rachel S. and Joffe, Alexander H.: *The Politics of Israeli Archaeology: Between ‘Nationalism’ and ‘Science’ in the age of the Second Republic*, Israel Studies, vol. 7, no. 3, 2002, p. 85.

¹¹⁹ Ibid., p. 87.

¹²⁰ “The Military reburial of Bar-Kochba’s men in 1969 ... became a national event. It was broadcasted in Israel’s new television service under the enthusiastic supervision of then Army Chief Rabbi Shlomo Goren and marked a high point in Israel’s relationship with its past.” Ibid., p. 88.

Archaeological Museum along with the former Department of Antiquities came under Israeli control. The Palestine Archaeological Museum hence became the headquarters of the Israeli Department of Antiquities and Museums. Just months prior to the War of 1967 the Palestine Archaeological Museum had been operated by a board of trustees comprising the aforementioned archaeological schools in Jerusalem, but shortly before the war broke out Jordan nationalized the Museum¹²¹ and consequently enabled Israel to claim it as theirs by right of conquest.¹²² This would support the idea that Israel in a way recognized Jordanian sovereignty, at least in regards to the *de facto* situation of East Jerusalem, while this remains the key issue for the rest of the West Bank (see above “*The Fourth Geneva Convention*”). Subsequent to the occupation of East Jerusalem and the West Bank Israeli archaeology found a new frontier in

the newly *acquired* West Bank ... [which] encompassed numerous Biblical and post-Biblical sites, including many which previously had, or began to acquire, religious significance, not least of which was the Western Wall¹²³ in Jerusalem [my emphasis].¹²⁴

As a result of the peace negotiations between Israelis and Palestinians in 1993-1994 the Israelis launched “Operation Scroll”, vacuuming primarily the West Bank for artefacts in anticipation of expected Israeli withdrawal from parts of it.¹²⁵

Palestinian archaeology

“Palestine has never been investigated, yet therein may be found a key to the distinctive nature of Arab Palestinian cultural history.”¹²⁶ Before the creation of the state of Israel, and before the occupation of the West Bank and Gaza Strip, archaeology was not a great concern for the Palestinians. Mainly Palestinians “were represented in the archaeological ventures only by uneducated laborers who assumed that the foreigners

¹²¹ Antiquities Amendment Law No. 77 of 1966, (Palestine Archaeological Museum).

¹²² Glock, Albert: *Archaeology as Cultural Survival: The Future of the Palestinian Past*, Journal of Palestine Studies, vol. 23, no. 3, 1994, p. 77.

¹²³ See further “*The War of 1967*” above.

¹²⁴ Hallote, Rachel S. and Joffe, Alexander H.: *The Politics of Israeli Archaeology: Between ‘Nationalism’ and ‘Science’ in the age of the Second Republic*, Israel Studies, vol. 7, no. 3, 2002, pp. 88-89.

¹²⁵ Glock, Albert: *Archaeology as Cultural Survival: The Future of the Palestinian Past*, Journal of Palestine Studies, vol. 23, no. 3, 1994, p. 70.

¹²⁶ Glock, Albert: *Cultural bias in the archaeology of Palestine*, Journal of Palestine Studies, vol. 24, no. 2, 1995, p. 57.

were unsuccessful in their search for gold.”¹²⁷ Palestine is a very small country and the historical importance or significance of the land, combined with the number of archaeological findings, leads to the conclusion that artefacts can be found almost everywhere – but prior to 1948 archaeology was not an important issue since the Palestinians had inhabited the land for ages and the Muslim domination of the country had been unbroken for almost 1300 years. Thus, the Palestinians were mainly occupied with the living cultural traditions of the land, such as folklore, architecture and Muslim shrines, rather than its ancient past.¹²⁸

Palestinian villages as artefacts

The British Mandate and the Jewish immigration were to change the Palestinian position on archaeology, since Palestinian villages and towns became relics themselves, or quite simply were eradicated following the creation of the state of Israel in 1948. Hundreds of villages were depopulated and some 700.000 Palestinians were forced into exile during the creation process, and the villages which were not taken over by Jewish immigrants became ruins. These ruin villages are of great concern for the Palestinians of today as a means for them to understand their own cultural heritage (see appendix V). But the locations of such villages are primarily on Israeli territory, and even though Israel lacks internationally recognized borders¹²⁹, with the exception of the boarder to Egypt, it would be naïve to believe that any area outside the internationally recognized armistice lines of 1948 would be part of a final peace settlement between the Israelis and the Palestinians.

The last resort for the Palestinians in this matter are excavations on Israeli territory, but “however desirable the excavation of a destroyed village would be, receiving a permit would predictably be virtually impossible because of Israeli fears that such endeavour would generate adverse nationalistic publicity among the Palestinians.”¹³⁰ The irony of this is that one of the depopulated villages, Lifta, near Jerusalem was restored in the late

¹²⁷ Ibid., p. 50.

¹²⁸ Glock, Albert: *Archaeology as Cultural Survival: The Future of the Palestinian Past*, Journal of Palestine Studies, vol. 23, no. 3, 1994, p. 76.

¹²⁹ Boyle, Francis A.: *Palestine, Palestinians and International Law*, Clarity Press Inc, Atlanta, 2003, p. 33.

¹³⁰ Glock, Albert: *Archaeology as Cultural Survival: The Future of the Palestinian Past*, Journal of Palestine Studies, vol. 23, no. 3, 1994, p. 82.

1980s by an Israeli government agency “as a natural history and study center emphasizing the Jewish connection with the soil of Palestine.”¹³¹

Domestic Laws regarding Archaeology in Palestine

The patchwork of different laws that govern Palestine today is the result of the changing sovereignties that Palestine has endured. The legal framework is composed of a mix between Ottoman, British and Jordanian laws in addition to Israeli Military Orders. Even though the Hague Regulations of 1907, which Israel recognizes as applicable to the occupation, restrict the occupier’s possibility to change the laws in place, they have not been respected since Israel argues that such changes has been of immense necessity to the occupier.¹³²

The Gaza Strip

The Gaza Strip is only about 385 square kilometres, and up to 30 per cent of that area consists of Israeli settlements and security zones. This leaves the rest of Gaza to 1.3 million Palestinian inhabitants, making Gaza one of the world’s most densely populated areas. The laws of Gaza are mainly British since Egypt during 1948-1967 only administered Gaza, not governed it. After 1967 Gaza fell under Israeli military administration, which has imposed a number of military orders. In regards to archaeology the British Antiquities Ordinance of 1928 is still in power and the main provisions of that law are:

- Antiquity is movable or immovable property produced by humans earlier than 1700 CE and human and animal remains dating back to before 600 CE.
- Any building or construction of a date later than 1700 CE may be declared to be an antiquity by the director of the Department of Antiquities¹³³.
- Any person discovering an antiquity without an excavation license must report his/her discovery to the appropriate officials such as the Department of Antiquities.

¹³¹ Glock, Albert: *Cultural bias in the archaeology of Palestine*, Journal of Palestine Studies, vol. 24, no. 2, 1995, p. 50.

¹³² See above “*The VI Hague Convention with Regulations of 1907*”.

¹³³ Department of Antiquities correlates today with the Department of Tourism and Antiquities of the Palestinian National Authority and the Minister of Tourism and Antiquities should correlate to the “High Commissioner”.

- The “High Commissioner” is empowered to acquire, on behalf of the government, any antiquity discovered as mentioned above with appropriate compensation.
- Excavations or searches for antiquities are prohibited unless a license has been obtained from the “High Commissioner”.
- Discrimination on grounds of race, nationality or religion is strictly prohibited by the Ordinance considering obtaining an excavation license.
- Compulsorily expropriation or lease of private land that are subject to an excavation licence are allowed if the landowner unreasonably refuses the excavation.
- Certain standard conditions must be met in order for an excavation license to be granted. Antiquities must be preserved and an adequate scientific publication of the results must be produced within two years form the completion of the excavation.
- Any antiquity can be required by the Director of the Department of Antiquities for the scientific completeness of the Palestine Archaeological Museum¹³⁴ or for the purpose of illustrating the history or art of Palestine.
- Trade in antiquities is illegal unless a license has been obtained from the director of the Department of Antiquities.

In 1973 the Ordinance was amended by Israeli Military Order no. 462, which prohibits the sale or transfer of antiquities to a person who resides outside the area (i.e. the Gaza Strip). Permissions may be granted in respect of particular objects or a particular type of antiquity. Traders of antiquities are required to keep an asset register; failure to comply constitutes an offense.¹³⁵

The West Bank

In the West Bank antiquities are governed by Jordanian law, but as this law has the same origin as in Gaza, since both territories were subject to the British Mandate, there are but small differences. The main provisions of Jordanian Temporary Law No. 51 on Antiquities, which apply to the West Bank, and the Antiquities Ordinance of 1929 in Gaza are the same, but as for the West Bank this law has been subject to several amendments through Israeli Military Orders. In addition to this, the non-discrimination clause in the Ordinance has been repealed and an applicant for an excavation license must show his/her scientific competence in regards to conducting an excavation.

¹³⁴ As mentioned above The Palestine Archaeological Museum is no longer controlled by the original board of trustees. Today it is called The Rockefeller Museum and is situated in occupied East Jerusalem.

¹³⁵ Oyediran, Joanna: *Plunder, Destruction and Despoliation: an Analysis of Israel's Violations of the International Law of Cultural Property in the Occupied West Bank and Gaza Strip*, Al-Haq, Ramallah, 1997, p. 33.

Further the applicant for a license must present a financial guarantee of 1.000-5.000 Jordanian Dinars on top of having a representative of the Department of Antiquities present at the excavation.

In 1986 the Israeli Military Order no. 1166 concerning Antiquities came into force in the West Bank. This law amends the Jordanian law and authorizes the antiquities staff officer for the West Bank to exercise most of the powers in the Jordanian law. The Antiquities Staff Officer is also given the power to arrest, confiscate or search individuals under the provisions of Military Order no. 378 concerning Security Provisions of 1970. As in the case of Military Order no. 462 in Gaza this order prohibits export of antiquities outside the area as well.¹³⁶

East Jerusalem

Israel illegally applies Israeli law to occupied East Jerusalem. Between 1967 and 1978 there was actually the same law that safeguarded antiquities, The Antiquities Ordinance of 1929. But in 1978 the Antiquities Law of 1978 (Law 885) came into force in Israel and as Israel illegally had annexed East Jerusalem the law was applied there. The definition of Antiquity is somewhat broader than the one in the Ordinance; zoological as well as botanical remains from before 1300 CE are considered antiquities, besides property of historical value which the Minister of Education and Culture declares to be an antiquity. The law introduces state ownership; any antiquity and the land upon which it was found becomes state property.¹³⁷ As in the case of Jordanian Antiquities Law in the West Bank, the non-discrimination clause has been dropped and the report provisions of a license have been strengthened. Collectors of antiquities who wish to deposit artifacts at museums may be requested, if the director of the Ministry of Education and Culture finds the artifact to be a ‘special antiquity’, to sell the item to the state.¹³⁸

¹³⁶ “Prohibiting any person from exporting any antiquity from the region...” Ibid., p. 35.

¹³⁷ Ibid., p. 36.

¹³⁸ Ibid., p. 36.

Acquisition of Land

Both the British and later the Jordanians and Israelis incorporated the Ottoman Land Code of 1858, and even though the Land Code has been amended and altered several times by the different authorities, the theoretical basis of the Code continues to apply. According to the Ottoman Land Code all lands in Palestine were classified into three categories:

- i) Wakf lands, which are lands that are dedicated to pious purposes,
- ii) Mulk land, which are the lands that were initially given out by the Ottoman conquerer of the area (who considered himself the owner, by conquest, of all the lands he occupied) to the Muslim residents and the Khuraj lands handed over to non-Muslims,
- iii) Miri, matruke, and mawat land, which are all considered by the Israeli authorities to be 'state' lands. Miri lands are lands which the Ottoman Emir (or Sultan) did not allow to be dedicated as wakf or given out to be possessed as mulk. It is land whose raqabeh (or ultimate ownership) constitutes to reside with the Emir, but whose use he has granted to the public under certain conditions.¹³⁹

In 1953 the Jordanian authorities declared all miri lands falling within the municipality area as being mulk land and thus being owned by the municipality.¹⁴⁰ Up until the occupation of 1967 all lands surrounding a village were respected as the property of the village. The lands were designated for public use and the inhabitants of a village did not have any opportunity or need to register their lands. "They knew amongst themselves which of the village lands belonged to which families and which were owned in common (mashaa)."¹⁴¹ Wakf lands were seen as dedicated to the Almighty and could naturally therefore not be registered. Prior to the British Mandate of Palestine, public or state lands did not exist but were introduced through the 1922 Order-in-Council. Article 2 of that Order defined public lands as: "all lands in Palestine by virtue of Treaty, Convention, Agreement or Succession and all lands which are or shall be acquired for the public service or otherwise."¹⁴² The Sultan's theoretical ownership, as the holder of the raqabeh, of all lands of Palestine, was replaced by the High Commissioner.

¹³⁹ Shehadeh, Raja: *Occupier's Law Israel and the West Bank Rev. ed.*, John D. Lucas Printing Company, Baltimore, 1988, p. 23.

¹⁴⁰ Law to Transfer the Land from Miri to Mulk, no. 41, 1953.

¹⁴¹ Shehadeh, Raja: *Occupier's Law Israel and the West Bank Rev. ed.*, John D. Lucas Printing Company, Baltimore, 1988, p. 24.

¹⁴² *Ibid.*, p. 24.

State Lands

Before the occupation of the West Bank in 1967 13 per cent of the lands were registered in the name of the state, but following the occupation this would change dramatically. Military Order No. 59 was issued on 31 July 1967; this Order defines state property as:

- (i) All property which on the specified date (i.e., 6 June 1967) pertained to one of the following:
 - (a) the enemy state,
 - (b) a juridical body in which the enemy state possessed any right, whether directly or indirectly, and whether this right referred to control or not;
- (ii) Property which was registered on the specified day in the name of one of the above two;
- (iii) Property in which one of the above two was a partner on the specified date;
- (iv) Property in respect of which on the specified date one of the two mentioned in (i) above was either an owner in partnership, or a registered owner, or was in possession.¹⁴³

It is by virtue of Military Order no. 59 that hundreds of thousands of dunums¹⁴⁴ of Palestinian lands have been declared state lands and transferred to Jewish settlers by the Israeli occupation administration.¹⁴⁵ A settlement nearly always correlates with Jewish settlements mentioned in the Bible (see above), and as such much land of historical and archaeological value has been “stolen” or “saved”/“resurrected” depending on the view of the spectator.

Until 1969 the Ottoman Land Code was still in effect in Israel but was abolished by the Israeli Land Law of that year. Article 153¹⁴⁶ of that law granted all lands of the aforementioned *miri* category full private ownership. “It is difficult to understand how Israel can interpret the same law to imply one thing in the West Bank and another in Israel, but this is in practice the case.”¹⁴⁷

¹⁴³ Ibid., p. 26.

¹⁴⁴ One dunum equals to 1000 square meters and was introduced in 1858 by the Ottoman Land Code and is still in use in both Palestine and Israel.

¹⁴⁵ See further “Absentees property” under “Jaffa after 1948”.

¹⁴⁶ “The ownership of property which immediately before the coming into force of this law belonged to the *miri* category shall be full ownership in accordance with the provisions of this law.”

¹⁴⁷ Shehadeh, Raja: *Occupier’s Law Israel and the West Bank Rev. ed.*, John D. Lucas Printing Company, Baltimore, 1988, p. 26.

Expropriation

There is a vast reluctance among the Palestinians against reporting archaeological findings on their lands, since expropriation is fairly easy at hand for the authorities whether they are Palestinian or Israeli. The density of evidence of the past throughout Palestine gives at hand that almost any land could be subject to expropriation.¹⁴⁸

The Jordanian Provisional Antiquities Law No. 12 of 1967, Article 5, Paragraph D, which applies to the West Bank, reads: “The Government may expropriate or buy any land or antiquity if it is in the interest of the Department to expropriate or buy it.”¹⁴⁹ Further the Israel Antiquities Law of 1978 (Law 885), Chapter 8, deals with expropriation: “An antiquity site whose expropriation is necessary, in his [the minister’s] opinion, for the purposes of preservation or research,” or “Any land whose expropriation is necessary, in his opinion, in order to facilitate excavation therein.”¹⁵⁰ As for the Gaza Strip these matters are subject to the British Antiquities Ordinance of 1929, which only recognizes compulsorily expropriation or lease of land if the landowner unreasonably has refused to allow excavations on the land¹⁵¹, and such acts are subject to appropriate compensation.¹⁵² In a sense a landowner has a much stronger protection regarding his or her property in the Gaza Strip than in the rest of Palestine, which conforms very nicely to the provisions of Article 17 of the UDHR:

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.

It could be argued that the property mentioned does not include immovable property such as land, but at the same time it would be ignorant to believe that such valuable property as land should be excluded.

¹⁴⁸ During my time in Palestine I learned that land or houses was not to be considered as security for loans by the banks, as it is virtually impossible for them to execute an eviction or confiscation. Land was in these matters almost treated as sacred, which probably has much to do with the Palestinian dispossession history, following the creation of the State of Israel and the occupation after the war of 1967.

¹⁴⁹ Glock, Albert: *Archaeology as Cultural Survival: The Future of the Palestinian Past*, Journal of Palestine Studies, vol. 23, no. 3, 1994, p. 78.

¹⁵⁰ *Ibid.*, p. 78.

¹⁵¹ Antiquities Ordinance of 1929, section 10.

¹⁵² *Ibid.*, section 19.

Cultural bias

As noted above the main focus on archaeology in Palestine has been Biblical archaeology, whether as means of discovering the origin of one's culture as in the case of Western European countries, or strengthening the connection to the physical land as in the case of Jewish archaeology. Without any doubt there have been a number of Human Rights violations in regards to the Palestinians' rights to their own cultural heritage in the form of illegal excavations on occupied territory. But there may also have been another form of Human Rights violations inflicted upon the Palestinians – cultural bias. Even though an excavation has not posed a violation of Human Rights law because of the manner in which it has been conducted, the data collecting and the interpretations of the findings may have.¹⁵³ As a violation not to codified norms and regulations, but rather to morals and ethics, it is hard, not to say impossible, to conclude that a breach of Human Rights regulations has been made in this sense. Archaeologists who, in their pursuit for excavation experience, have travelled to Israel to participate in excavations have witnessed about the neglect of certain cultural layers during the course of the excavation. Which these “cultural layers” are is not known, but it is not too far-fetched to believe that it may have something to do with findings not suitable for the political agenda in Israel. G. W. Bowersock, a professor of Ancient History at Princeton, writes about this. Authentic letters of the Jewish rebel Bar Kokhba (see above) were found by Yigael Yadin, who was both an archaeologist and a politician:

To a dispassionate eye they [the letters] scarcely show the famous figure as an inspiring leader (I once called him a pious thug), but nonetheless Yadin was pleased to introduce him [Bar Kokhba] to the Israeli public as nothing less than the first president of Israel.¹⁵⁴

Another of Yadin's discoveries was made in the early 1960's, in a cave in the Judean desert. Yadin recovered some thirty-five personal documents concerning a Jewish woman by the name Babatha, who fled into the wilderness prior to the mentioned revolt for security. The documents concern her legal affairs over a period of forty

¹⁵³ “While bias in the collection of physical evidence in excavation or survey may appear to be a function of technical competence, actually it is as culturally deliberate as site selection.” Glock, Albert: *Cultural bias in the archaeology of Palestine*, Journal of Palestine Studies, vol. 24, no. 2, 1995, p. 52.

¹⁵⁴ Bowersock, G. W.: *Palestine: Ancient History and Modern Politics*, Journal of Palestine Studies, vol. 14, no. 4, 1985, p. 52.

years. Regarding the excerpts of the documents that has been released and the actual meaning of them Bowersock writes:

It is clear that the relation between Jews and Arabs in the territory south of the Dead Sea was a harmonious one. It is amply apparent that in the archive of Babatha we have precious documentation for a social coherence in Palestine that mirrored the administrative and geographical unity.¹⁵⁵

A re-examination of article 27 paragraph 1 of the Universal Declaration of Human Rights gives at hand: “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.” To the best of my knowledge this would implicate that both Israelis and Palestinians have been denied their right “to share in scientific advancement” as well as to free participation in the cultural life – this applies in particular to the Israelis of both Jewish and Arab origin. Bowersock concludes:

It scarcely matters whether it is by accident or design that neither Yadin nor any other scholar has seen fit to publish this extraordinary material [the archive of Babatha]. In a society in which archaeological discoveries are often extensively reported, the fact that it remains unpublished to this day is eloquent enough.¹⁵⁶

Solution

Since pillage is formally forbidden in Article 47 of The Hague Regulations of 1907, a way of defending Israeli perpetrations upon the cultural heritage of Palestine, especially in the occupied territories, is to draw an analogy with the rules of usufruct stated in Article 55 of the same regulations, which reads:

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.

¹⁵⁵ Ibid., pp. 52-53.

¹⁵⁶ Ibid., p. 53.

Normally this applies to agriculture, but it could be seen as if the occupying power has harvested the historical fruits of the land. The interesting question that arises is that the artefacts harvested allow consumption without being destroyed, contrary to the case with normal agricultural products. Besides this, it is stated that the occupying state is only regarded as administrator and should as such return the artefacts upon the ending of the occupation.¹⁵⁷ Since most of the artefacts of both Israeli and Palestinian territories are nowadays found in and around Jerusalem, the easiest way to solve the question regarding the right to the findings is to grant asset to them for both parties. Some of the artefacts will have to be returned to the Palestinians since they are a matter of great national importance for the Palestinians. But to solve this small part of the conflict and at the same time solve one of the greatest parts, it is the authors' humble suggestion to place Jerusalem under international administration, *Corpus Separatum*, according to the original partition plan of 1947, which in any case already has been accepted by Israel in her declaration of independence. This would end the illegal occupation of East Jerusalem and would furthermore grant access to the city of Jerusalem for Palestinians, Israelis and the people of the world in general, since we all have a given right to each other's cultural heritage as we are all humans.

As a result of the creation of the *Corpus Separatum*, both Israel and Palestine would be able to call Jerusalem their capital and the embassies of the world, now situated in Tel Aviv, could all be re-established in Jerusalem and accredited to both nations.¹⁵⁸ This would ensure access to the artefacts for all; this is from my point of view one of the key issues in this matter since a vast majority of the Palestinians are denied or prohibited to visit Jerusalem by the Israelis under the illegal occupation.

In addition to resolving the violations of the moral rights of the Palestinians, which may have occurred, the names of all villages, towns and cities that were changed or altered to conform with the Biblical Judeo-Christian tradition, prior to the creation of the State of Israel, should be recognized internationally equally to those names.

¹⁵⁷ "The occupying power may ... work the land and harvest the crops ... but with the limitation that [it] may not exceed the period of the occupation." Ginbar, Yuval: *Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects*, B'Tselem, Jerusalem, 1997, p. 13.

¹⁵⁸ Boyle, Francis A.: *Palestine, Palestinians and International Law*, Clarity Press Inc, Atlanta, 2003, pp. 75-77.

Cultural Property and Traditional Knowledge

In this section I have chosen to study the city of Nablus, since it applies to both the concept of cultural property with its two millennia old city core, and to the craft of traditional knowledge in the form of manufacture of olive oil soap. Cultural Property is mainly seen as artefacts, old buildings, monuments and the like. But it would also be fair to argue that olive groves, bearing in mind the age of such and the extent of the cultivation, could be considered as a form of cultural property.

Definition of cultural property

The Hague Regulations of 1954 define cultural property as something tangible: artefacts, books, monuments et cetera. Archaeological sites are protected by this convention and a generous definition could result in the conclusion that an olive grove could be considered to be a form of an archaeological site due to the age of the olive trees and the centuries' old cultivation and harvest of those. But other treaties of international law contain a broader perspective of cultural property; such is the case in The Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted by UNESCO on 16 November 1972 which also protects

sites (works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view).¹⁵⁹

Agriculture as cultural property

Taken the above into consideration, in my view, agricultural landscapes could in their historical environment clearly be defined as a form of cultural property. Cultural property does not necessarily have to be the result of the work of highly skilled craftsmen in form of clay pots, wine containers or marble temples. Cultural property can be manifested as buildings which are still inhabited as well as fields, areas, cultivations or sites that still are cultivated by man.

¹⁵⁹ Dutli, María Teresa in cooperation with Bourke Martignoni, Joanna and Gaudreau, Julie: *Protection of Cultural Property in the event of Armed Conflict*, International Committee of the Red Cross, Geneva, 2002, p. 148.

Olive groves

As a matter of fact olive trees can live for about a thousand years, and should in my opinion well be within the range of cultural property. Additionally, the olive groves of Palestine have been harvested in ways established during the course of generations. “Olives are the staple crops for a Palestinian society traditionally dependent on agriculture.”¹⁶⁰ The economic factor of the olives, and the products stemming from olives, such as the traditional manufacturing of soap in the Nablus area, cannot be overestimated in regards to the Palestinian economy.¹⁶¹ Whether or not the olive groves of Palestine could fall within the definition of cultural property, they are still protected by both The Hague Regulations of 1907 and the Fourth Geneva Convention of 1949. The protection can be found in The Hague Regulations of 1907 articles 23, 46 and 56:

[Art. 23.] In addition to the prohibitions provided by special Conventions, it is especially forbidden

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

[Art. 46. Para. 2.] Private property cannot be confiscated.

[Art. 56.] The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

These articles combined apply whether the groves are owned privately, i.e. situated on *mulk* lands (see above), or owned publicly, i.e. *miri* lands. Further the protection of property such as olive groves can be found in Articles 53 and 147 of the Fourth Geneva Convention of 1949:

¹⁶⁰ The Applied Research Institute-Jerusalem – ARIJ: *Olive Harvest in Palestine: Another Season... Another Anguish*, the Applied Research Institute-Jerusalem, Jerusalem, 2004, p. 2.

¹⁶¹ “The annual income of generated by olives and olive products comprises 40% of the gross product of fruit trees in Palestine and more than 20% of the overall national agricultural output. The olive crop makes up approximately 4.6% of the Palestinian GDP.” *Ibid.*, p. 2.

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

...extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

These articles protect the groves regardless of ownership. Olive groves have been subject to expropriation and destruction for a long time¹⁶², and this has been excused as a necessity when establishing settlements, security zones and bypass roads (see appendix VI). I will not go further into the question of the legality of settlements other than the fact that they are prohibited under the provisions of the Fourth Geneva Convention, which Israel claims to be *applicable* but not *justiciable* in regards to the occupied territories. Article 49 of the said Convention reads:

[Paragraph 1.] Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

[Paragraph 6.] The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

“Transfer of citizens of the occupying power, and even housing them temporarily in the occupied territory, is permitted, but only to assist the military administration in the occupied territory.”¹⁶³ Settlements and confiscation of land are only justified if meeting the military needs of the occupant; the extent of settlement activity, confiscation and requisition of land of today makes such an argumentation hilarious (see appendix VI).

¹⁶² “In the last four years... the Israeli occupying forces have uprooted almost 400.000 olive trees with a value of over 60 million dollars (U.S.)” The Palestinian Ministry of Agriculture (2004) in *Ibid.*, p.2. “[This] constitutes an immense economic and environmental disaster that promises to impact Palestinian society severely for generations to come.” *Ibid.*, p. 2.

¹⁶³ Ginbar, Yuval: *Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects*, B’Tselem, Jerusalem, 1997, p. 10.

Traditional Knowledge

”Olive trees have always been essential elements in the cultural life and physical existence of the Palestinian people. The trees are also a means of existence for families benefiting from its numerous products including oil, soap and wood.”¹⁶⁴ It may be that the art of Palestinian olive soap manufacturing may not fall within the requisites for protection of traditional knowledge, since soap making has for generations been well known around the world.

There is no clear definition of traditional knowledge but the WIPO secretariat used the following working concept for fact-finding missions in 1998-1999:

‘traditional knowledge’ ... refer[s] to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. “Tradition-based” refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; “expressions of folklore” in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description of TK would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of “heritage” in the broad sense.¹⁶⁵

In this light, the craft of olive oil soap manufacturing in Nablus would be defined as traditional knowledge. Nablus has been the centre of soap manufacturing for hundreds of years since it is located strategically in the northern fertile parts of the West Bank. Almost 70 per cent of all of Palestine’s olive trees can be found in those parts of the

¹⁶⁴ The Applied Research Institute-Jerusalem – ARIJ: *Olive Harvest in Palestine: Another Season... Another Anguish*, the Applied Research Institute-Jerusalem, Jerusalem, 2004, p. 3.

¹⁶⁵ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: *Traditional Knowledge – Operational Terms and Definitions*, WIPO, Geneva, 2002, p. 11.

West Bank.¹⁶⁶ In 1930, during the British mandate, more than 12 per cent of the value of the Palestinian exports came from olive-oil soap from Nablus.¹⁶⁷

Until 2002 soap factories in the Nablus area were among the largest employers in the region, but after the siege of Nablus in that year all this has changed. In the spring of 2002 the Israeli Defence Forces launched an extensive attack on the city of Nablus, destroying large parts of the historical city core, apart from attacking many of the soap factories in the area.

The manufacture of soap from olive oil is one of the traditional industries of Nablus and one of its largest employers ... Nablus soap has been world renowned since the 16th century when it was the soap of choice for Queen Elizabeth I. The largest soap factory in Nablus was obliterated during the April 2002 invasion by a bomb dropped from an F 16.¹⁶⁸

Whether the olive-oil soap of Nablus is granted protection as traditional knowledge or not, most of the buildings and factories it was and is manufactured in are protected as cultural property, due to the age of the buildings in question.

Even if traditional knowledge presents a weak or no protection in regards to olive-oil soap manufacturing, there are other areas of the cultural heritage of the Palestinians where it could offer the only form of protection.

Traditional Middle-Eastern foods such as hummus, falafel¹⁶⁹, tabouleh, koubbeh, etc., have been co-opted from Palestinian cuisine and are often presented as typically Israeli. Local herbs that Palestinians use for cooking and healing, like Za'tar, have also become part of an Israeli "nativist" approach.¹⁷⁰

¹⁶⁶ The Applied Research Institute-Jerusalem – ARIJ: *Olive Harvest in Palestine: Another Season... Another Anguish*, the Applied Research Institute-Jerusalem, Jerusalem, 2004, p. 3.

¹⁶⁷ El-Eini, Roza I. M.: *Trade agreements and the continuation of tariff protection policy in mandate Palestine in the 1930s*, Middle Eastern Studies, vol. 34, no. 1, 1998.

¹⁶⁸ International Solidarity Movement - Vancouver: *Israeli Occupation Forces attack traditional economy of Nablus*, 2003-04-08, <http://valis.squeegeemedia.com/ism-vancouver/archives/000078.html>

¹⁶⁹ At a conference at the Israeli Bar Association in Tel Aviv I noted a poster with a picture of falafel stating "Made with pride in Israel since 1948".

¹⁷⁰ Sa'id, Ahmad H.: *Catastrophe, memory and identity: Al-Nakbah as a component of Palestinian identity*, Israel Studies, vol. 7, no. 2, 2002.

The Palestinians have in this sense been deprived of their traditional knowledge and cultural heritage without proper recognition.

The old city of Nablus

Nablus was founded by the Canaanites in 2500-3000 BC. It was later rebuilt by the Romans and named Flavia Neapolis, from which the name of Nablus is considered to be derived. Most of the old city of today is from the Ottoman period, including 30 olive-oil soap factories, 7 of which were functioning. “Nablus old city is an example of an authentic historic centre, with a viable economy and stable residency, and well integrated with the modern city.”¹⁷¹ As such Nablus old city clearly falls within the protection of cultural property in The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, third passage: “centres containing a large amount of cultural property, known as ‘centres containing monuments’.”

As such it would be fair to conclude that the old city is protected as a unit, not as single buildings. During the siege of Nablus in spring 2002 the Al-Kannan soap factory site was completely destroyed.

[T]he site contained two olive-oil soap factories (al-Kannan and al-Nabulsi)... [t]he destroyed factories were two of the city’s famous 18th century soap factories... [t]wo other soap factories were partially demolished: the Abu Shamat factory was hit by tank shells... and the free-standing Masri family factory (built in 1890) was totally burnt from tank shells. Explosives were also placed inside the buildings.¹⁷²

The damage caused to the old city core of Nablus during the spring of 2002 is estimated to more than 70 per cent of the city fabric; this includes the whole infrastructure of the city such as roads, electricity and sewage.¹⁷³ It would be evidently clear that the Israelis have inflicted a paramount damage to not only the traditional craft of soap making but to the cultural heritage of Palestine during the attack on Nablus in 2002. The nature of cultural property and cultural heritage stretches even further and I would like to quote Dr. Hamdan Taha of Birzeit University:

¹⁷¹ International Council on Monuments and Sites (ICOMOS) Palestine: *Destruction in the West Bank, April 2002*, 2002-04-11, <http://www.international.icomos.org/risk/2002/palestine2002.htm>

¹⁷² Ibid.

¹⁷³ Taha, Hamden: *Report: The Destruction of cultural heritage sites and monumental buildings in the old city of Nablus*, Birzeit University, Ramallah, 2004, p. 2.

[C]ultural heritage has a universal value, damage incurring to any cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind and a loss for the culture of the world.¹⁷⁴

Intellectual Property Rights in Palestine in General

The Palestinian Authority, the PA, as an emerging state has not signed any conventions ratifying Intellectual Property laws. Palestine, however, is indirectly committed to the GATT-TRIPS agreement. In article 23 of the Interim agreement on the West Bank and Gaza Strip (Oslo II, annex III) signed by Israel and Palestine, the PA acknowledged that it would respect the values and views of the TRIPS agreement. Clause 23 (4) (b) (1-2) states that:

Each side shall use its best efforts to adopt in its legislation standards of protection of intellectual property compatible with those in the GATT Agreement on Trade Related Aspects of Intellectual Property, and each side will strive to establish an adequate system for the examination of applications for registrations of intellectual property rights compatible with those in GATT-TRIPS.

As mentioned before the legislation differs within the jurisdiction of the PA due to the different sovereignties in modern history, but the basic principles are the same because the ancestor of the legislation is Britain in both the West Bank and in the Gaza Strip, irrespective of their former *de facto* authorities Jordan and Egypt. Without going any further into details there are protection for Copyright, Patents and Designs, Trademarks and Merchandise Marks in act in Palestine. All of this legislation stems from the British mandatory period, and therefore the legislation is from 1922-1947, some times even older, when British legislation rendered applicability such as the British Copyright Act of 1911 through the Copyright Ordinance of 1924.

¹⁷⁴ Ibid., p. 4. If the grievous violations on the Palestinian cultural heritage fall within the definition of ‘war crimes’ in the Fourth Geneva Convention and the 1907 Hague Regulations, the perpetrators are “*hostes humani generis* – the enemies of all mankind.” Boyle, Francis A.: *Palestine, Palestinians and International Law*, Clarity Press Inc, Atlanta, 2003, p. 61.

Intellectual Property Rights in Israel in General

Israel is a signatory to several international agreements such as the Paris convention and the Lisbon agreement. Further Israel is a member of the Patent Cooperation Treaty (PCT) and is also a member of the World Trade Organization (WTO), and has therefore to comply with the obligations of the TRIPS agreement. In other words Israel can be considered a modern state in regards to Intellectual Property protection, but the legal framework in Israel stems from the Mandatory period as well – but the Israelis have had the capacity to alter and match the legislation to an international Intellectual Property regime, an opportunity the Palestinians has not been given due to lack of statehood.

Case Study: Copyright

As an occupied people the Palestinians have had troubles governing themselves, especially in regards to legislation and an effective police and court system. The lack of statehood has effectively disabled the Palestinians from entering a more modern legal system in regards to Intellectual Property.

The situation has successfully been used both by Israelis and Palestinians. The two peoples often go to the same prisons, and in prison they get to know each other and they also find ways of cooperation. Apart from the most known joint venture crime, car theft¹⁷⁵, copyright infringements are very common.¹⁷⁶ In this perspective especially the West Bank is interesting, since it has a very long border towards Israel, while the Gaza Strip has a short and tightly controlled border with few points of enter and exit. The criminals use the uncertain situation in regards to borders, land, legislation and jurisdiction. Due to the occupation of the Palestinian territories, Palestinians did not have the proper jurisdiction over their own territory. But according to the Oslo Accords jurisdiction was transferred to the Palestinian National Authority in some areas completely, and in some areas the jurisdiction was chaired. This led to an ambivalence in regards to authority, i.e. who was in control over the area, and since Palestine is a

¹⁷⁵ Before the new intifada broke out in late September 2000, the most common joint venture crime was to steal cars in Israel and drive them to the border of the West Bank, where the Palestinian partner drove them across the border. In the West Bank the car got Palestinian plates and was now registered as a Palestinian vehicle. If the partners in crime did not get the right prize for the car in the West Bank they could now safely sell it back to Israel. This was a regular nightmare for the insurance companies.

¹⁷⁶ In Palestine the British Copyright Ordinance of 1924 is still enforced.

very small country there were simple opportunities to change jurisdiction. Computer programs are protected by copyright and in order to obtain protection the legislation in power demanded registration in both areas with full jurisdiction (Gaza and Jericho) up until July 19, 1994 when President Arafat issued a decree stating that a registration would be equally valid in both the West Bank and the Gaza Strip. The West Bank and the Gaza Strip are maybe not the most valuable markets for computer program producers, and sometimes the necessary procedures were not taken by the producers, which led to the fact that Palestinians could legally copy computer programs, which were later exported to Israel. This was applicable for all copyright protected features such as music, films and literature, and the aforementioned partners in crime travelled extensively back and forth from the West Bank. Even if there were a registration and hence protection this issue was easily solved by moving the production of copyright infringements to an area with chaired control by the Israelis and Palestinians, which then resolved in a form of juridical vacuum since Israelis and Palestinians did not always know who were to intervene. With the signing of the Oslo II, the parties tried to, at least in theory, handle the joint-venture infringement situations. Oslo II, annex III (4) (g) reads:

[E]ach side will extent its administrative and judicial protection to intellectual property right-holders of the other side. The purpose of this protection is to permit effective action against any act of infringement of intellectual property rights under this Agreement, including expeditious remedies to prevent infringements, and remedies which constitute a deterrent to future infringements.

Trademarks and Merchandise Marks

For further reading of this thesis a basic knowledge of the Trademarks regimes in both Palestine and Israel is useful. In Gaza trademarks are governed by the Trademarks Ordinance No. 35 of 1938, while a virtually identical Trademarks Law No. 33 of 1952 is applicable in the West Bank. Both establish that the proprietor of a trademark in Palestine owns the sole right to the use of the trademark in association of the goods with which the trademark is registered. There is a demand for registration and the trademark is open for opposition after being published in the Gazette for a period of three months. Licenses granted is valid for 7 years and thereafter renewable for periods

of 14 years. The holder of a trademark retains the right to bring civil action against any perpetrator in addition to criminal proceedings.

Merchandise Marks is regulated by the Merchandise Marks Ordinance of 1929 in Gaza and Jordanian Law No. 19 of 1953 for Merchandise Marks in the West Bank. The laws are identical in text as well as in spirit, and are designed to offer protection for the consumer by prohibiting false trade descriptions. Trademarks, and unregistered marks – comprising of figures, words, marks or any arrangement or combination thereof, whether including a trademark or not – are protected by these laws. Under them, it is prohibited to sell, expose or label goods under a false trademark or trade description, and such acts could result in criminal proceedings given that the perpetrator acted with intent to defraud.

In Israel trademarks are governed by the Trademarks Ordinance (new version) of 1972 and the Trademarks Rule. The international classification system is in use in Israel and there is a need for separate registrations for each class. This also give at hand that searches for the admissibility of a trademark are more easily done in Israel than in Palestine. Collective and certification trademarks may also be registered. In Israel use of an unregistered mark can create common law rights for the owner of the mark, but registration provides a strong protection. Registered trademarks may also be transferred or licensed to other parties.

Jaffa, the Oranges and the Trademarks referring to these

The city of Jaffa is known in Palestine as The Bride by the Sea or The Bride of Palestine, but in our hemisphere the name Jaffa is mostly known as a brand of oranges and different citrus fruits. The export of citrus fruits to Europe started in the mid 19th century, but citrus had been grown in this region for more than a millennium before the export to Europe began.¹⁷⁷ In 1912-1913 there were over 1.6 million cases of oranges exported to Europe.¹⁷⁸ The British Mandatory period began in 1918 and lasted until 1947 and it was during this period the brand Jaffa was to be known for a lager public in

¹⁷⁷ Dror, Yuval: *Made in Israel / What ever happened to Jaffa oranges?*, Haaretz, 2004-09-15, <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=478418>

¹⁷⁸ Loubani, Refaat M.: *Palestine before 1947*, 2001-11-07, <http://netfinity2.palestineremembered.com/Acre/Palestine-Remembered/Story664.html>

Europe. The Arabs living in the region of Jaffa had early on taken interest in the economic remedies of the citrus export, and by the year 1947 the land area occupied by citrus cultivation was 281.488 dunums¹⁷⁹; about 55 per cent of those were owned by Palestinian Arabs¹⁸⁰, see further appendix V. During the end 30s citrus export came to app. 75 per cent of the total value of all Palestinian export¹⁸¹ – the citrus fruits of Palestine had a market share of about 40 per cent in England¹⁸², and 1.6 million cases in 1913 had turned into 16 million cases of oranges by 1939.¹⁸³

Jewish Immigration

During the late 19th century the Jewish immigration to Palestine started to intensify. At first it was just small numbers of immigrants who came to Palestine, but later on the numbers started to grow. The immigration began shortly after Theodore Herzl had founded the World Zionist Congress. The purpose of the organization was to create a Jewish homeland, preferably in Palestine. A thing that is often forgotten is that during the whole Jewish Diaspora, there had been Jews living side by side with Arabs in various locations in Palestine, mostly in the western parts of Palestine.

When settlers of the First Aliyah [wave of Jewish immigration to Eretz Israel] arrived in the early 1880s, they found the local Arab citrus industry already in operation, supervised by entrepreneurs whose center of activity was in the vicinity of Jaffa.¹⁸⁴

The Jews set up their own citrus industry in so called agricultural settlements, at sites at sufficient distance from the Jaffa region, for example Petah Tikva in the north western part of Palestine. Jewish citriculture differed from its Arab counterpart in ways of using modern machinery and Western agricultural methods but “in many areas of citriculture

¹⁷⁹ One dunum equals 1000 square meters.

¹⁸⁰ Loubani, Refaat M.: *Palestine before 1947*, 2001-11-07,

<http://netfinity2.palestineremembered.com/Acre/Palestine-Remembered/Story664.html>

¹⁸¹ Karlinsky, Nahum: *Californian Dreaming: Adapting the “California Model” to Jewish Citrus Industry in Palestine, 1917-1939*, Israel Studies, vol. 5, no. 1, 2000.

¹⁸² El-Eini, Roza I. M.: *Trade agreements and the continuation of tariff protection policy in mandate Palestine in the 1930s*, Middle Eastern Studies, vol. 34, no. 1, 1998.

¹⁸³ Loubani, Refaat M.: *Palestine before 1947*, 2001-11-07,

<http://netfinity2.palestineremembered.com/Acre/Palestine-Remembered/Story664.html>

¹⁸⁴ Karlinsky, Nahum: *Californian Dreaming: Adapting the “California Model” to Jewish Citrus Industry in Palestine, 1917-1939*, Israel Studies, vol. 5, no. 1, 2000.

(e.g., cultivation, marketing, credit, etc.), Hebrew farmers continued to rely on the *knowledge* and services of Arab managers [my emphasis].”¹⁸⁵

The “Jaffa” brand

The first type of orange to reach Palestine was called the *Baladi*. By the time of the start of citrus export to Europe the cultivators had discovered a spontaneous mutation that was elliptic, seedless and easy to peel; it was given the name *Shamuti*.¹⁸⁶ When these shamuti oranges reached Europe they were called ‘Jaffa Oranges’, or ‘Jaffa’ for short. “The first evidence of the export of citrus fruit from Palestine under the brand name ‘Jaffa’ is from the years 1920-1925.”¹⁸⁷ There are some living trademarks that were registered before the creation of the State of Israel which refer to Jaffa. They are “Jafforange” that were registered in 1930 and “Miss Jaffa” registered in 1932, both registered by The Palestine Fruit Co. “Assis” Ltd. Nevertheless both trademarks were registered for products deriving from oranges or fruits, such as juice and jam, not the actual oranges. However, following the creation of the State of Israel, two trademarks referring to both oranges (citrus fruits) and Jaffa was registered: “‘Pardess’ Jaffa Oranges” and “Lord Jaffa”, both registered in June 1948 by Pardess Syndicate of Israel Citrus Growers Cooperative Society Ltd., for images see appendix VII¹⁸⁸.

The Citrus Marketing Board was founded by the British administration in 1940 and it was through their initiative that all oranges produced in Palestine were marketed under the Jaffa name, which was a great success.¹⁸⁹

A theory that might prove to be true is that since Britain was the single most important importer of the Jaffa oranges during this time, there was no need for registering the trademark “Jaffa” since it falls well within the protective sphere of Merchandise Marks, which at the time also applied in Britain. Further the brand name “Jaffa” was probably to be used in a generic way by all orange producers in all orchards of Palestine, as is the

¹⁸⁵ Ibid.

¹⁸⁶ “Shams” is the Arabic word for sun and “shamous” is the plural form. Possibly the name “Shamuti” is derived from this.

¹⁸⁷ Dror, Yuval: *Made in Israel / What ever happened to Jaffa oranges?*, Haaretz, 2004-09-15, <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=478418>

¹⁸⁸ All images from the Israeli Trade Marks Database: <http://patentim.justice.gov.il/db1.htm>

¹⁸⁹ Dror, Yuval: *Made in Israel / What ever happened to Jaffa oranges?*, Haaretz, 2004-09-15, <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=478418>

case of the Jaffa brand in Israel today. The bureaucracy for licensing the trademark to all producers was simply not needed since Britain controlled both the exporter and importer.

The main issue here is that the Palestinians before and especially during the British Mandate benefited greatly from the exports of citrus, which were shipped mostly from the port of Jaffa, and therefore were called Jaffa Oranges in particularly Europe.

In Sweden the first trademark containing the word “Jaffa” was registered in 1956 as “Jaffa Gold” by Citrus and Canned Products Association. This was followed in 1968 by “Jaffas” and in 1991 by “Jaffa” both registered by the Citrus Marketing Board of Israel.

Jaffa after 1948

The Citrus Marketing Board was rapidly transferred into The Citrus Marketing Board of Israel after the State of Israel had been created.

The city of Jaffa in 1948 had a population of 71.000. By November 1948, all but 3.651 were forcefully evicted from their homes. The city was then taken over by Jewish immigrants, and renamed YAFO.¹⁹⁰

The emergency committee of Jaffa had entered an agreement with the Hagana on the 13th May 1948 in order to declare the city a non fighting city; the inhabitants wished to stay in the city and were by the division plan allowed to do so. Further the Hagana clearly stated in the agreement that they would respect “the Geneva Convention and all International Laws and Usages of war.”¹⁹¹ In the agreement “the Jews pledged themselves to protect Arab life and property in Jaffa... [l]ater the Jews went back on their pledge and occupied Arab homes and properties in Jaffa.”¹⁹²

After the Palestinians had been driven from their lands the Israelis quickly moved in to possess the absent property. This was made legal under the Israeli jurisdiction through

¹⁹⁰ Americans for Middle East Understanding: *Lest the Civilized World Forget The Colonization of Palestine*, Americans for Middle East Understanding, Inc., New York, 1992, p. 46.

¹⁹¹ Gendzier, Irene: *Memorandum Submitted to the Government of the United States of America by the Jaffa and Districts Inhabitants Council, 11 April 1949*, Palestine Studies, vol. 18, no. 3, 1989, p. 99-101.

¹⁹² *Ibid.*, p. 105.

the Absentee Property Law of 1950. By virtue of that law a custodian was appointed to manage this property. The Development Authority (Transfer of Property) Law of 1950 established a Development Authority in Israel which was permitted to buy lands placed under control of the Custodian of Absentee Property¹⁹³. An absentee is defined as someone who has left to go to a country which is in a state of war with Israel. After the war of 1967 the definition was broadened by Military Order No. 58, Order Concerning Abandoned Property, of 1967. An absentee is someone who has left the West Bank before, during or even after the war of 1967.¹⁹⁴ This would make a Palestinian who left the West Bank prior to the war of 1967 for the United States (not in a state of war with Israel) an absentee.

Apart from the vast amount of orchards and dunums of land confiscated by Israel, the Israelis nowadays are in total control of the agricultural export from Palestine. The goods are required to be channelled through Israel's export marketing board, Agrexco, which sells the produce at profits accruing to Israel and under an Israeli brand name.¹⁹⁵ This would, if detected, under all circumstances be a grave breach of the Association Agreement between the European Union and Israel which grants Israel preferential access to the European market. Products produced in the Palestinian territories and/or products produced in settlements on occupied Palestinian soil do not fall within the parameters of the Agreement. These products are not covered by the Agreement and are not given preferential access to the European Market.¹⁹⁶

Conclusion

It would be evidently clear that the Palestinians have been deprived of their Human Rights as well as their Intellectual Property Rights in the case of Jaffa. First and foremost the Palestinians have been separated from their traditional livelihood of orange cultivation in form of orchards. Secondly, I would like to argue that the

¹⁹³ Shehadeh, Raja: *Occupier's Law Israel and the West Bank Rev. ed.*, John D. Lucas Printing Company, Baltimore, 1988, p. 34. "The Development Authority has eight members of the Jewish National Fund (A semi-governmental corporation, which holds in its name approximately 93.3% of the lands in Israel, pre-1967.) and seven representatives of the State of Israel."

¹⁹⁴ *Ibid.*, p. 35.

¹⁹⁵ *Ibid.*, p. 242.

¹⁹⁶ *Implementation of the Interim Agreement on trade and trade-related matters between the European Community and Israel: Rules of Origin*, May 13th, 1998 in Eghraghi, Shahin: *European trade and Israeli occupation An assessment of the European trade and development policies in the Middle East peace process*, Stockholm University, Stockholm, 2001, p. 31.

Palestinians in that manner have a right to the brand name “Jaffa”, under the international provisions of the Lisbon Agreement for the protection of Appellations of Origin, as former majority owners of the orchards that produced the well known “Jaffa Oranges”. Israel is a signatory to this convention; Palestine is not due to lack of statehood. Thirdly, the current state of affairs – labelling remaining Palestinian oranges with the “Jaffa” label and the revenues thereof ending up in the hands of the occupiers – is, at the very least, a grave breach to public moral, which in the case of the European Union should end in termination of the Association Agreement.

Solution

It would be ignorant to believe that the former Palestinian owners of the Jaffa orchards, which were forced into exile in 1948, would get their orchards back or that they would be compensated with partnership of the CMBI, (Citrus Marketing Board of Israel). Therefore it is the author’s humble suggestion that the former owners are compensated in accordance with United Nations General Assembly resolution 194 (III) of 11 December 1948, by the surplus which CMBI makes from licensing the trademark “Jaffa” to other countries and producers outside Israel.¹⁹⁷ It is at present not all that much, but this would serve several purposes. (1) The Palestinians would be rightfully compensated. (2) The trademark “Jaffa” would be politically cleansed and this would hopefully increase sales to benefit for both parties. (3) Since the compensation derives from activities outside Israel, this could not be viewed by the religious right (for example the Mizrahi community), or by any other opponent, as giving Israeli property away.

Conclusive remarks

The scope of this study is far too broad to be thoroughly examined by means of this thesis. My aim however has been to present to the reader an outlook of the Human Rights and Intellectual Property Rights of the Palestinian people, of how they can be combined, and of how they sometimes interact. Since the violations inflicted upon the Palestinians discussed in this study often have elements of both, it is however easy to

¹⁹⁷ Dror, Yuval: *Made in Israel / What ever happened to Jaffa oranges?*, Haaretz, 2004-09-15, <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=478418>

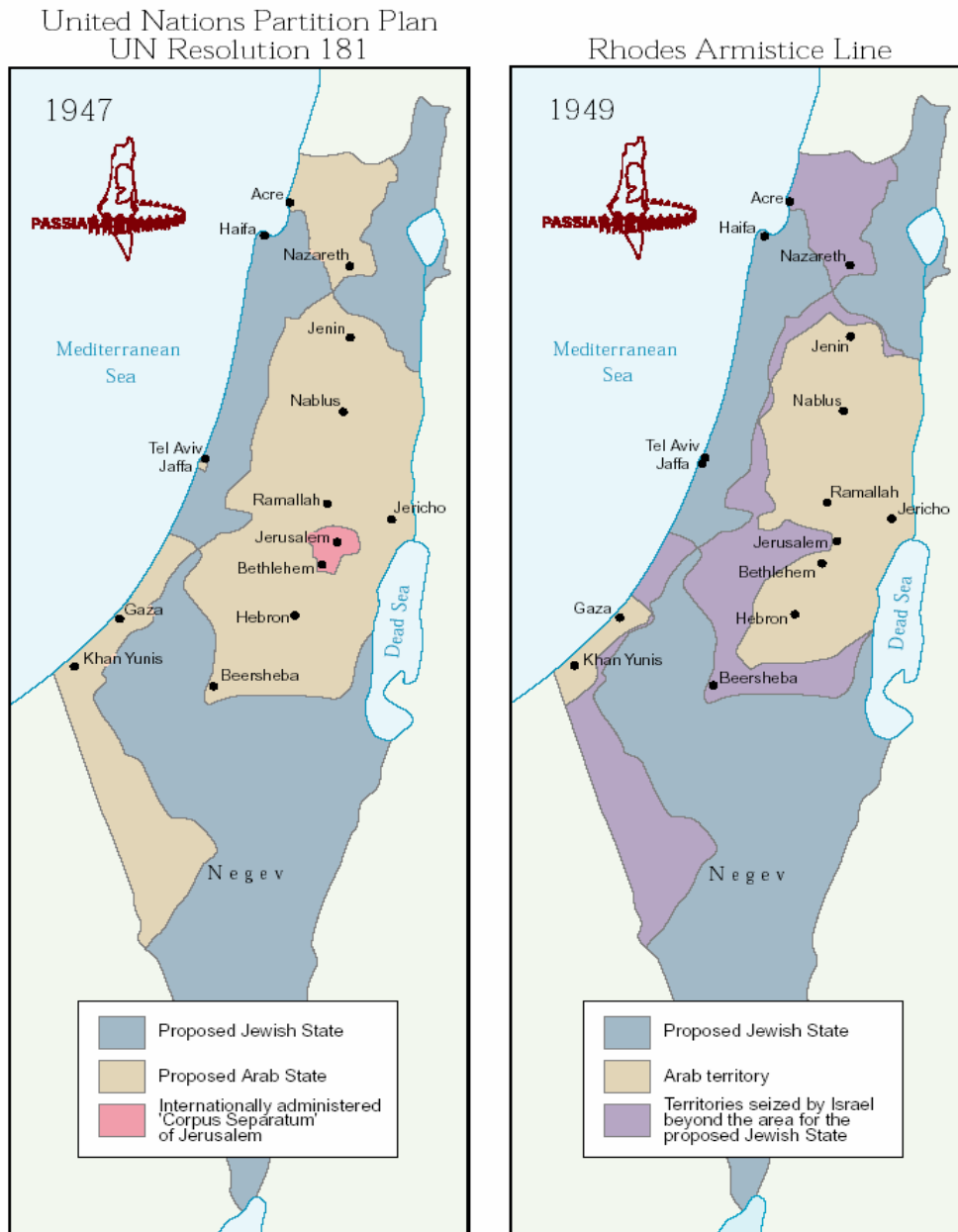
end up with a Human Rights perspective even though it has been my intention to shed some light on both areas. For the future my hopes for peace and prosperity goes out to the peoples in question – but how this will be achieved is truly another question.

Appendices

Appendix I

Partition Plan UN Res. 181 and the Rhodes Armistice Line, 1949

PALESTINE MAPS



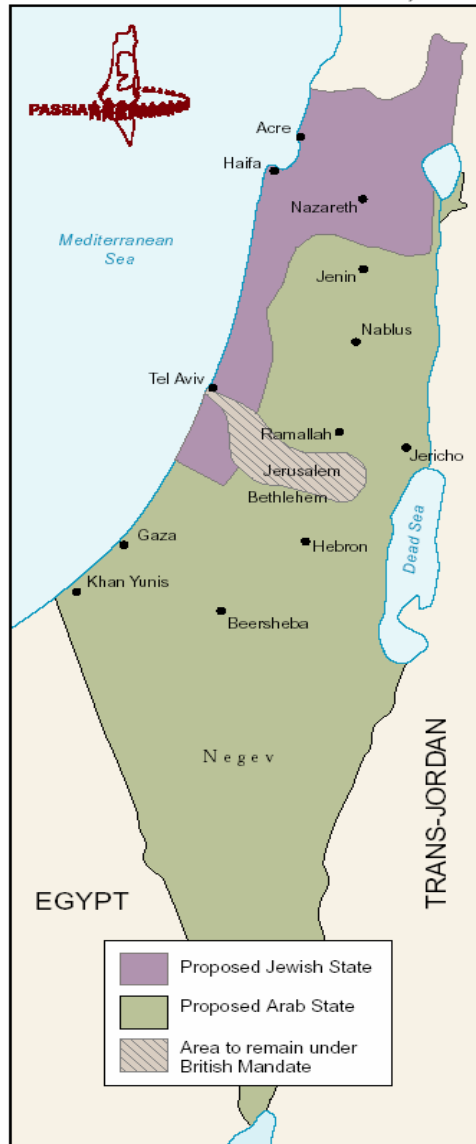
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Appendix II

Peel Commission Partition Plan, 1937

PALESTINE MAPS

Peel Commission Partition Plan, 1937



**Source: Palestine Royal Commission Report (Peel)
July 1937, London: HMSO**

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Appendix III

Article 22 of the Covenant of the League of Nations

Article 22. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the formance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above-mentioned in the interests of the indigenous population.

In every case of Mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

Appendix IV

Woodhead Partition Plan, 1938 Recommended Boundaries: Plan C

PALESTINE MAPS

**Woodhead Partition Plan, 1938
Recommended Boundaries: Plan C**



Source: *Palestine Partition Report (Woodhead Report) 1938*, London: HMSO

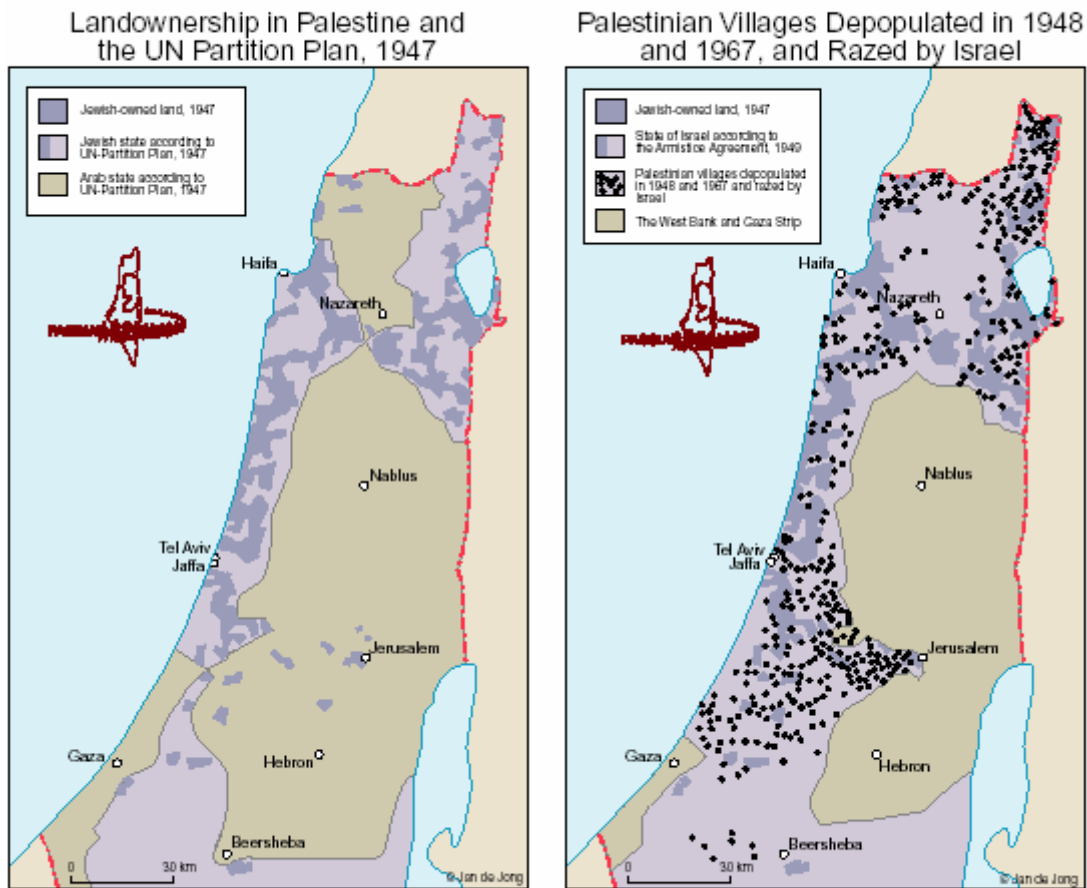
The Woodhead Commission was sent to Palestine to recommend the best possible boundaries in the event of the partition of Palestine. The commission expressed reservations about the feasibility of partition per se. The boundaries drawn in Plan C were considered the best possible to meet the objectives of separating the Arab and Jewish communities.

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Appendix V

Landownership in Palestine in 1947 and Villages Depopulated and Razed

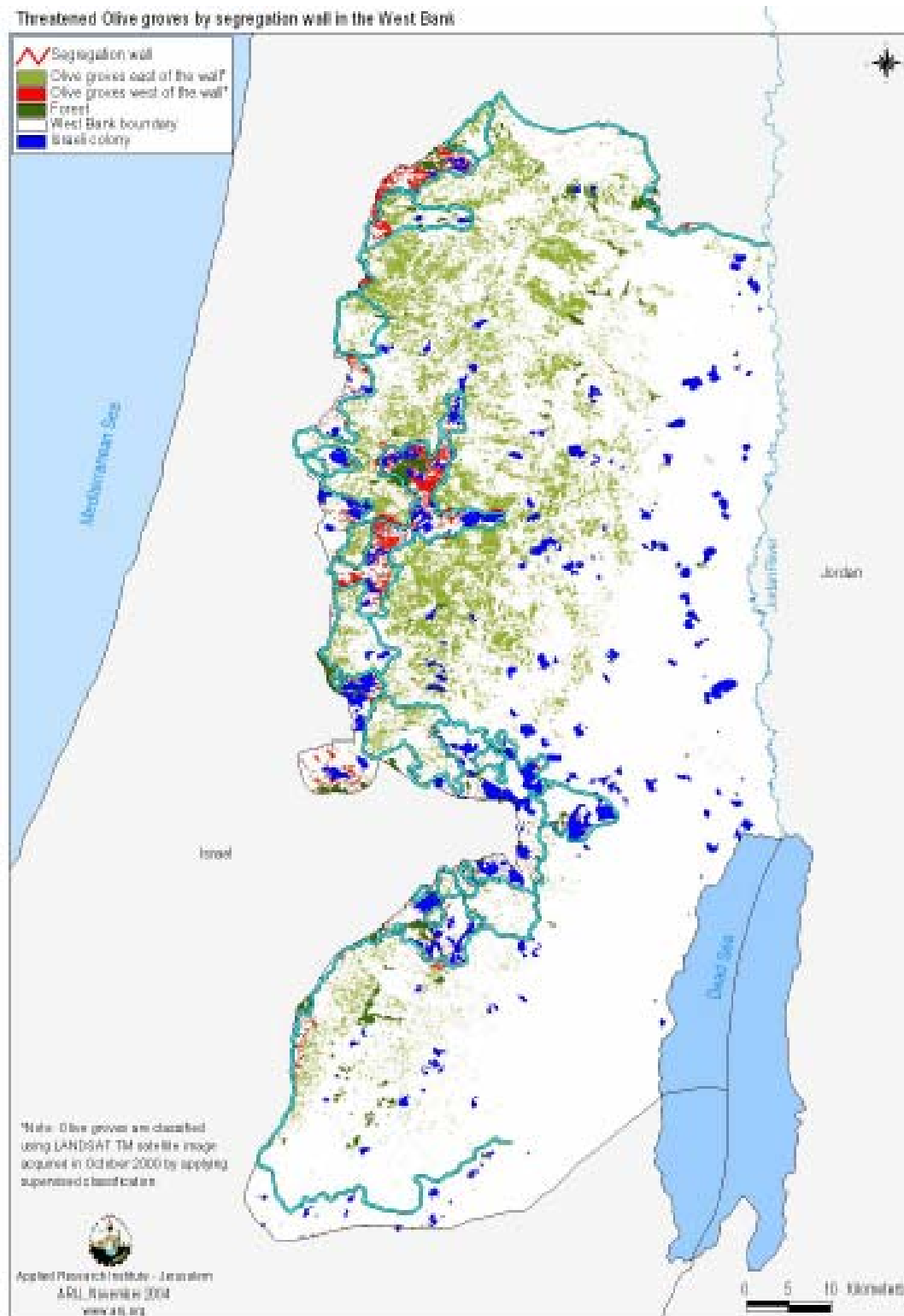
PALESTINE MAPS



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Appendix VI

Threatened Olive Groves in the West Bank



Appendix VII

Images of Jaffa related Trademarks



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All images of trademarks from the Israeli Trade Marks Database: <http://patentim.justice.gov.il/db1.htm>