



AL-HAQ

Cultural Apartheid

Israel's Erasure of Palestinian
Heritage in Gaza



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“Crimes against or affecting cultural heritage often touch upon the very notion of what it means to be human, sometimes eroding entire swaths of human history, ingenuity, and artistic creation.”¹

The Office of the Prosecutor of the International Criminal Court

1 International Criminal Court, “Policy on Cultural Heritage” (June 2021) para. 17, available at: <<https://www.icc-cpi.int/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf>>.

1 Introduction

The preamble to the 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works describes cultural heritage as “the product and witness of the different traditions and of the spiritual achievements of the past and thus is an essential element in the personality of the peoples of the world.”² Embodying both archeological and historical elements, cultural heritage is reflective of the values, language, history, beliefs and practices that underpin the identity specific and unique to a people.

The protection of cultural heritage in situations of armed conflict is of particular concern³ and is enshrined in a number of legal instruments,⁴ for example, the Hague Regulations (1907) whose Articles 47 and 56 prohibit the destruction, pillage and theft of cultural property,⁵ together

2 Preamble to the 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works; a sweeping definition of cultural property is enshrined in Article 1 of the 1954 Hague Convention: “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 sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centers containing monuments’” Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954, Article 1, <https://en.unesco.org/sites/default/files/1954_Convention_EN_2020.pdf>.

3 See e.g. UNSC Resolution 1257, 15 October 1999, S/RES/1267(1999); UNSC Resolution 1483, 22 May 2003, S/RES/1483(2003); UNSC Resolution 2199, 12 February 2015, S/RES/2199(2015)

4 See Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Articles 34 & 35, <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/110-20034?OpenDocument>>;

5 “Pillage is formally forbidden,” Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 47, <<https://ihl-databases.icrc.org/ihl/INTRO/195>>; “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 willful 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. Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 56, <<https://ihl-databases.icrc.org/ihl/INTRO/195>>.

with the Fourth Geneva Convention (1949) that prescribes the respect and safeguarding of cultural objects from war.⁶ It is further solidified by a major legal instrument specifically addressing the protection of occupied peoples' heritage, the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict,⁷ ratified by Israeli in 1957.⁸ Israel later ratified the 1972 World Heritage Convention that combines nature and cultural property conservation in 1999,⁹ but refused to ratify the 1970 UNESCO Convention on the Prevention of Illicit Import, Export and Transfer of Cultural Property, ensuring protection of cultural heritage resources in wartime as in peacetime.¹⁰

This international legal framework is further complemented by international human rights law, where cultural rights constitute one of the main pillars of a people's capacity to develop and exist. Under Article 22 of the Universal Declaration of Human Rights, "everyone... has the right to... social and cultural rights indispensable for his dignity and the free development of his personality".¹¹ It is complemented by common Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which stipulates that "[a]ll peoples have the right [to] freely pursue their economic, social and cultural development".¹² The latter importantly outlines how a people's identity is intrinsically connected to

6 See also Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945, Article 6, <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/350-530014?OpenDocument>>.

7 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954, <https://en.unesco.org/sites/default/files/1954_Convention_EN_2020.pdf>.

8 See "Israel," <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=IL&nv=4>.

9 UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, <<https://whc.unesco.org/en/conventiontext/>>.

10 UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, <http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html>; UNESCO, "States Parties Ratification Status," <<https://whc.unesco.org/en/statesparties/>>.

11 UNGA, Universal Declaration of Human Rights, 10 December 1948, 217A(III), Article 22

12 UNGA, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Article 1(1); UNGA, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 1(1)

its ability to develop its cultural heritage, including by “tak[ing] part in cultural life,” which entails “the conservation, the development and the diffusion of science and culture”.¹³

Since 1967, Israel, as Occupying Power has administered the occupied Palestinian territory (OPT) (i.e. the West Bank, including East Jerusalem and the Gaza Strip),¹⁴ under the framework of the Hague Regulations (1907), the Fourth Geneva Convention (1949), international human rights law, customary international law and relevant treaties to which it is bound. However, during this time, Israel has conducted a series of unlawful acts that run counter to internationally recognized human rights and humanitarian norms in order to entrench its colonial domination, employing a policy of cultural erasure,¹⁵ the military targeting of cultural property,¹⁶ and the appropriation of cultural heritage.¹⁷ Such actions have included removing artefacts of scientific, historical and archaeological interest,¹⁸ carrying out illegal archaeological excavations whose outcomes directly serve Israel’s colonial narrative, and strategically targeting and destroying any cultural sites that are not directly exploitable to confirm this narrative.¹⁹

13 UNGA, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Article 15(2)

14 Nota Bene: This report provides a general overview of Israel’s illegal policies and practices targeting Palestinian lands recognized as constitutive of the occupied Palestinian territory by the international community in order to contextualize the understanding of its deprivation of Gaza cultural heritage. This analysis is supported by an international legal framework applicable in occupied territory and confirmed by the International Court of Justice in the *Wall* advisory opinion. Palestinian territory colonized by Israel since 1948, is not directly included in this analysis because this would necessitate an extended, comprehensive, although highly necessary analysis of those mechanisms at play, how they intertwine with that of the occupied Palestinian territory to reinforce Israel’s domination, and what they reveal of the entrenchment of Israel’s domination over Palestinian cultural heritage.

15 Tamara Tamimi, “Israeli Appropriation of Palestinian Cultural Heritage in Jerusalem” (MIFTAH) <https://www.un.org/unispal/wp-content/uploads/2019/06/MIFTAH_Submission_1July2019.pdf>

16 “Ministry of Culture details Israel’s attack on Gaza’s cultural institutions” WAFA (19 May 2021) available at: <<https://english.wafa.ps/Pages/Details/124612>>

17 Al-Haq, “Special Focus on Sebastia for World Tourism Day: Palestinian Tourism Remains a Major Target of Israel’s Colonial Strategy” (27 September 2021) <https://www.alhaq.org/cached_uploads/download/2021/09/27/world-tourism-day-casestudy-ag-1632765728.pdf>.

18 Emek Shaveh, Yesh Din, “Appropriating the Past: Israel’s Archaeological Practices in the West Bank” (26 December 2017) <<https://emekshaveh.org/en/appropriating-the-past-israels-archaeological-practices-in-the-west-bank/>>.

19 Al-Haq, “House Demolitions and Forced Evictions in Silwan Israel’s Transfer of Palestinians from Jerusalem” (2020) 20, available at: <https://www.alhaq.org/cached_uploads/download/2021/08/17/silwan-webversion-1-page-view-1629184473.pdf>

Through its policies and practices, Israel is targeting cultural heritage sites with the sole objective to entrench its cultural hegemony over Palestinian lands, without the Palestinian people. Far from serving a legitimate goal of archeological conservation, preservation and valorization, such policies and practices have advanced illegal Israeli archaeological excavations and surveys, illicit artefact trafficking, and the destruction of heritage sites.²⁰ Meanwhile, cultural archeological sites located in the West Bank are increasingly threatened by Israel's annexationist measures.²¹ The erection of the apartheid wall, outpost and settlement expansion and bypass roads have both caused irreparable harm to Palestinian cultural heritage, while completely sealing off many archeological sites from the West Bank to further illegal *de facto* annexation.²²

This report by Al-Haq, builds from an investigation by the London-based research agency Forensic Architecture, and draws on Israel's strategic bombing of the Gaza coastline to exemplify the erasure of Palestinian cultural heritage and the denial of attached human rights. The report argues that Israel's bombardments not only breach the principle of military necessity in violation of the laws of armed conflict, but also aim at gradually erasing Palestinian cultural heritage to deny the Palestinian people of their right to self-determination over their cultural resources, and by extension threatens their existence as a people. Such bombings are a gross violation of the Rome Statute, constituting war crimes, and crimes against humanity.

20 Diakonia IHL Resource Centre, "Occupation Remains A Legal Analysis of the Israeli Archaeology Policies in the West Bank: An International Law Perspective" (2015) available at: <<https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2021/06/israeli-Archaeology-policies-ihl-occupation-report.pdf>>.

21 Al-Haq, "Establishing Guidelines to Determine whether the Legal Status of 'Area C' in the Occupied Palestinian Territory represents Annexed Territory under International Law" (2020) available at: <https://www.alhaq.org/cached_uploads/download/2020/07/17/establishing-guidelines-interactive-1-1594999806.pdf>.

22 See Ahmed Rjoob, "The Impact of Israeli Occupation on the Conservation of Cultural Heritage Sites in the Occupied Palestinian Territories: The Case of 'Salvage Excavations,'" *Conservation and MGMT of Archaeology* 11, No. 3-4 (2009).

2

Palestinian Cultural Heritage and Israel's Successive Military Attacks on the Gaza Strip

Some 12,000 archaeological sites have been surveyed in the OPT, the majority of them by Israel since it militarily occupied the territory in 1967.²³ In spite of their cultural significance, no archeological sites in Gaza have been classified to date under the UNESCO World Heritage List.²⁴ Nonetheless, as a party to the UNESCO World Heritage Convention,²⁵ the State of Palestine has submitted three Gaza sites on its tentative list to be considered for inclusion on the World Heritage List- Tell Umm Amer, Wadi Gaza Coastal Wetlands and Anthedon Harbour.²⁶

Located in Al-Nusairat coastal village, south bank of Wadi Gaza, Tell Umm Amer is an ancient settlement established during the Roman era along the Gaza seashore. The Monastery of Saint-Hilarion was constructed in 291 A.D., as the birthplace of Saint Hilarion, considered the forebearer of monastic life in Palestine.²⁷ It served as a central station on the road from Mesopotamia to Egypt through Palestine.²⁸ Anthedon Harbour is the oldest known seaport of Gaza situated along the Mediterranean Sea, in the vicinity of the al-Shati (Beach) Refugee Camp.²⁹ Inhabited from 800 B.C. to 1100 C.E., it is noted as a major economic, social and cultural hub on the trade route between Europe and the Levant.³⁰ Anthedon Harbour sustained significant damage during Israel's military offensive on the Gaza Strip in May 2021.

23 Ahmed Rjoob, "The Impact of Israeli Occupation on the Conservation of Cultural Heritage Sites in the Occupied Palestinian Territories: The Case of 'Salvage Excavations,'" *Conservation and MGMT of Archaeology* 11, No. 3-4 (2009), 215.

24 To date, three sites are classified in the West Bank: Nativity Church in Bethlehem & the Pilgrimage Route, Battir and Hebron's Old Town. Nine additional cultural sites are listed in Palestine 1948. See UNESCO, "World Heritage List," <<https://whc.unesco.org/en/list/>>.

25 The State of Palestine ratified the UNESCO World Heritage Convention on 8 December 2011,

26 See UNESCO, "Tentative Lists – State of Palestine," <<https://whc.unesco.org/en/tentativelists/state=ps>>.

27 "Saint Hilarion: Palestinian Monk" Britannica (1 January 2022) available at: <<https://www.britannica.com/biography/Saint-Hilarion>>

28 See UNESCO, "Tell Umm Amer," <<https://whc.unesco.org/en/tentativelists/5716>>.

29 See UNESCO, "Anthedon Harbour," <<https://whc.unesco.org/en/tentativelists/5719/>>.

30 See UNESCO, "Anthedon Harbour," <<https://whc.unesco.org/en/tentativelists/5719/>>.

During Israel's military offensive on the Gaza Strip between 8 July and 26 August 2014, Al-Haq reported the complete and partial destruction of 61 and 120 mosques, in addition to the partial destruction of one church.³¹ Similarly, during the May 2021 military offensive, antiquities and cultural heritage sites were both directly targeted and indirectly damaged due to their close proximity to affected areas. In the latest military assault on the Gaza Strip between 10 and 21 May 2021, Palestinian human rights organizations reported damage to public and private properties including 124 places of worship, of which 7 were completely and 117 partially destroyed, one market which was partially destroyed, and damage to 37 tourism facilities – 6 completely and 31 partially destroyed.³²

A non-exhaustive list of Palestinian antiquities and cultural heritage sites damaged in the May 2021 airstrikes³³ includes:

- The Rosary Sisters School, sustaining major cracks in the building, the destruction of the event hall, requiring potential demolition in the near future;
- The Holy Family Church, also a support and assistance center for the impoverished, sustaining major cracks;
- The Great Omari Mosque – also called the Great Mosque of Gaza, the second oldest mosque in Palestine;
- Katib al-Wilaya Mosque and the Historic Church of Saint Porphyrius,

31 See Table 'Public Buildings Destroyed Between 7 July and 26 August 2014,' in Al-Haq, "Divide and Conquer: A Legal Analysis of Israel's 2014 Military Offensive Against the Gaza Strip" (2015), 9, <<https://www.alhaq.org/publications/8070.html>>.

32 According to the Palestinian human rights organizations' terminology, 'total damage' refers to the destruction or damage of a property "to such an extent that it can be neither recovered nor repaired for further use, so the property must be demolished and rebuilt;" 'severe partial damage' refers to "damage that exceeded the destruction of windows, doors, and water tanks, and led to the demolition of walls or main pillars; nevertheless, the house is repairable and can be used as a new house;" 'partial damage' refers to "damage that did not affect walls or main pillars, and is limited to burning and destruction of windows, doors and water tanks;" 'minor damage' refers to damage such as "broken window panes, damage to water tanks or damage to furniture." Joint Report Al-Haq, Al-Mezan and Palestinian Centre Human Rights, "May 2021 Assault in Numbers: A Statistical Report on Civilian Casualties and Damage of Private and Public Properties by Israeli Occupation Forces During Israel's Full-Scale Military Operation on the Gaza Strip Between 10-21 May 2021" [on file with Al-Haq].

33 Hadeel Al-Gherbawi, "Gaza Antiquities Among Casualties of Israeli-Hamas War," *Al-Monitor*, 20 June 2021, <<https://www.al-monitor.com/originals/2021/06/gaza-antiquities-among-casualties-israel-hamas-war>>.

whose wall was hit in the bombing, damaging both places of worship;

- Houses of the historical Zeitoun neighborhood;
- Tell el-Sakan archeological site;
- Tal Umm Amer and the ruins of Saint-Hilarion monastery.

I. Israel's Bombing of Cultural Heritage Sites in the Occupied Gaza Strip: A Case Study of the Gaza Coastline

During Israel's military attack in May 2021, Israeli warplanes heavily and arbitrarily bombarded the Gaza seashore, leaving a multitude of craters over the top of buried archeological remains.³⁴ In this section Al-Haq draws on an investigation conducted in 2021 by Forensic Architecture in the Gaza Strip, which examines the impact of these bombardments on ancient Palestinian cultural property.



Red spots identify crater impacts created by Israel's May bombing along the coastline © 2022 Forensic Architecture with Drone Footage by Ain Media Gaza

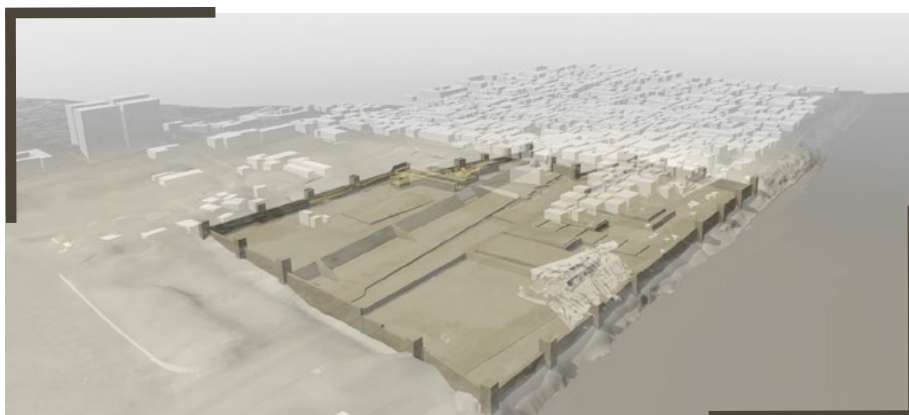
The Gaza coastline is well-known to be of major archeological significance. Excavations carried out in the mid-late 1990s led to the discovery of a Roman-era city wall and adjacent streets and buildings. Further excavations led to the discovery of a defensive wall (rampart) from the Iron Age – dating to the late 7th century B.C.E. – houses dated from the Achaemenid period – between 539 and 332 B.C.E. – a fountain, houses, an emporium and a villa

³⁴ Forensic Architecture, "Living Archaeology," video report, February 2022, available at <<https://vimeo.com/611220125>>; Ministère Palestinien du Tourisme et des Antiquités, Ministère Français des Affaires Étrangères and École Biblique et Archéologique Française de Jérusalem, Mission Archéologique de Gaza: Coopération Franco-Palestinienne 1995-2005 (Ecole biblique et archéologique de Jérusalem, October 2012)

from the Greco-Roman City of Anhedon during the Hellenistic and Roman periods between 332 B.C.E. and 324 C.E. and also a church and a cemetery dated to the Byzantine period 324-638 C.E. The archeological remnants were later covered with earth for protection and preservation.³⁵

These archeological remnants are already endangered by the combination of natural hazards and erosion. Winter storms often uncover lots of pottery and coins are often found along the beach, near the Al-Shati refugee camp, and lost to the advancing erosion. Moreover, a significant section of the old Roman city now remains buried below open lands where modern construction – places of worship, sport facilities and other infrastructural projects have been built upon to respond to increasingly pressured demographic needs in the densely populated Gaza Strip.³⁶

Israel's blockade on Gaza has significantly contributed to hinder archeological excavations in the area. Archeologists have been prevented from accessing archeological sites for over a decade, and scientific research can only be carried out digitally. Systematic Israeli bombings on open lands have left large craters leaving evidence of damage to the ground.³⁷



© Forensic Architecture 2022 "Living Archaeology" video report, Digital Reconstruction of Old Roman City, Gaza

35 Forensic Architecture, "Living Archaeology," video report, February 2022, available at <<https://vimeo.com/611220125>>.

36 Forensic Architecture, "Living Archaeology," video report, February 2022, available at <<https://vimeo.com/611220125>>.

37 Forensic Architecture, "Living Archaeology," video report, February 2022, available at <<https://vimeo.com/611220125>>.

Damage caused to the ground by repeated Israeli bombings in 2012, 2014, 2018 and 2021 on empty land east of Al-Shati refugee camp is identified in the below photographs:



© Forensic Architecture 2022; Satellite Image: © CNES (2018), Distribution Airbus DS/Spot Image



© Forensic Architecture 2022; Satellite Image: © CNES (2018), Distribution Airbus DS/Spot Image



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II. Cultural Erasure as a Pillar of Israel's Apartheid: Preventing the Palestinian Right to Self-Determination and Development

Heritage is inherently connected to a people, their culture and identity. Indeed, heritage is a dynamic concept that reflects and bridges the past, the present and the future of a people through transmission. All manifestations of cultural heritage are inherently protected by international human rights law, including the contribution of cultural heritage to the development of a people, and the collective exercise of the right of self-determination.

a. The Right to Cultural Heritage of the Palestinian People

The destruction of cultural heritage in the context of Israel's widespread and systematic bombings of Gaza, has critical consequences for the Palestinian people's right to enjoy their cultural rights. Recently, there has been a shift from a purely humanitarian approach to the preservation and safeguarding of cultural heritage to a human rights-understanding of cultural heritage rights as part of identity rights of peoples.³⁸ The UNESCO Declaration on the Intentional Destruction of Cultural Heritage underlines that "cultural heritage is an important component of the cultural identity... and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights".³⁹

Article 15(1)(a) of the ICESCR recognizes the right of everyone to take part in cultural life.⁴⁰ Such rights include access to everyone to his or her "own cultural and linguistic heritage".⁴¹ Israel's prolonged military blockade of the Gaza Strip, coupled with its indiscriminate and strategic bombings has prevented the Palestinian people from preserving and protecting their

38 HRC, Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed, A/HRC/17/38, 21 March 2011, para. 6

39 UNESCO Declaration on the Intentional Destruction of Cultural Heritage, preamble

40 UNGA, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Article 15(1)(a)

41 UN CESCR, General Comment No.21 Right of Everyone to Take Part in Cultural Life (Article 15), 21 December 2009, E/C.12/GC/21, para.49(d)

cultural heritage, including their ability to:

- Proactively safeguard and maintain cultural heritage sites. For example, the preamble to the Convention on the Safeguarding of the Intangible Cultural Heritage stipulates that “communities, in particular indigenous communities... play an important role in the production, safeguarding; maintenance and recreation of the intangible cultural heritage”,⁴²
- Ensuring opportunities for access to cultural heritage sites, as provided for in the 1976 UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It.⁴³
- Know and understand their own culture through quality education. States have an international obligation to “endeavour by all appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect by their peoples of the cultural and natural heritage” as expressed under Article 27(1) of the Convention concerning the Protection of the World Cultural and Natural Heritage.⁴⁴

b. Cultural Heritage as Elemental to the Palestinian People’s Self-Determination

As expressed by the independent expert in the field of cultural rights, Farida Shaheed:

[T]o speak of cultural heritage in the context of human rights entails taking into consideration the multiple heritage through which individuals and communities express their humanity, give meaning to their existence, build their worldviews and represent their encounter

⁴² Convention for the Safeguarding of the Intangible Cultural Heritage, preamble

⁴³ Expressed as “concrete opportunities available to everyone, in particular through the creation of appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property.” Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, 26 November 1976, Article 1(2)(a)

⁴⁴ Convention concerning the Protection of the World Cultural and Natural Heritage, Article 27(1)

with the external forces affecting their lives.⁴⁵

A customary norm of international law, the right to self-determination entails the pursuance of cultural development as a fundamental element of a people's identity, as enshrined in Common Article 1(1) of the ICCPR and ICESCR.⁴⁶ Targeting cultural heritage is not an empty gesture. Culture constitutes a visible expression of human identity. Depriving a people of their culture is tantamount to emptying them of the very substance that forms the backbone of their right to self-determination, especially in a context of cumulative, interconnected and systemic human rights violations.

45 HRC, Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed, A/HRC/17/38, 21 March 2011, para. 6

46 UNGA, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Article 1(1); UNGA, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 1(1)

III. Criminal Liability Before the International Criminal Court

Cultural property during military occupation is specifically protected, for example, Article 53 of the 1977 Additional Protocol I to the 1949 Geneva Conventions prohibits “any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”⁴⁷ Further the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, provides in Article 4 that, “[the Parties] undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings... which are likely to expose it to destruction or damage in the event of armed conflict”.⁴⁸ In addition to these international humanitarian law protections the following section will examine potential criminal liability which may accrue for acts of intentional targeting of cultural property during armed conflict.

a. Targeting Gaza Cultural Heritage, a War Crime under the Rome Statute

As stipulated by the Office of the Prosecution, Article 8(2)(b)(ix) should be interpreted in conjunction with international human rights and humanitarian law provisions protective of cultural heritage, including the 1954 Hague Convention and other core international humanitarian law instruments.⁴⁹

The Office of the Prosecutor undertook to give “particular attention to

47 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 53(a), <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=D-76C3391F1A412C5C12563CD0051DCEB>>.

48 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954, Article 4(1), <https://en.unesco.org/sites/default/files/1954_Convention_EN_2020.pdf>.

49 See UNGA, Rome Statute of the International Criminal Court, 17 July 1998, Article 21(3), <https://legal.un.org/icc/statute/99_corr/cstatute.htm>; International Criminal Court, “Policy on Cultural Heritage,” 5, 12, June 2021

attacks against cultural, religious, historical and other protected objects.⁵⁰ Acts amounting to war crimes may include the directing of attacks against cultural objects, destruction or seizure of property, appropriation of cultural property, or the pillage of cultural property. Article 8(b)(ix) of the Rome Statute of the International Criminal Court (ICC), as *lex specialis*, prescribes that “(i)ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, [...] provided they are not military objectives” may amount to war crimes, especially “when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”⁵¹

Furthermore, when a cultural object is damaged incidentally and consequent to a disproportionate attack on an otherwise legitimate military objective – the collateral damage suffered will override the anticipated military advantage, and the attacker may be prosecuted for a war crime under Article 8(2)(b)(iv) of the Rome Statute.⁵²

The ICC can build upon a solid body of jurisprudence emanating from the International Criminal Tribunal for the former Yugoslavia (ICTY). Importantly, the ICTY convicted Pavle Strugar for the bombing of the UNESCO World Heritage Site of Dubrovnik pursuant to Articles 27 and 56 of the Hague Regulations.⁵³ In September 2016 in the *Al Mahdi* case, the ICC convicted Ahmad al-Faqi al Mahdi under Article 8(b)(ix), in the first cultural property case of its kind.⁵⁴

In addition, it is to be underlined that Article 8(2)(b)(ix) provides a lower standard of criminal characterization than the ICTY since the mere act of “directing an attack,” independent of actual damage, is sufficient to fall within its scope. In effect, the indiscriminate targeting of open lands overlying well known ancient archeological sites, may amount to an

50 International Criminal Court, “Policy Paper on Case Selection and Prioritisation,” 15 September 2016, para.46

51 UNGA, Rome Statute of the International Criminal Court, 17 July 1998, Article 8(b)(ix), <https://legal.un.org/icc/statute/99_corr/cstatute.htm>.

52 International Criminal Court, “Policy on Cultural Heritage,” June 2021, 17

53 ICTY, Prosecutor v. Pavle Strugar, IT-01-42-T, Judgment of 31 January 2005

54 International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgement and Sentence, 27 September 2016, <<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/15-171>>.

indiscriminate bombing of civilian cultural objects.

b. Targeting Cultural Property as the Crime Against Humanity of Apartheid

The targeting of Palestinian cultural heritage, fundamentally affects the core of their identity and existence as a people. The ICC underlines the nexus between destruction of cultural heritage and crimes against humanity, especially when the former occurs within the context of an attack against a civilian population, forms part of a state policy and is carried out in a widespread or systematic manner.⁵⁵ Additionally, under the Rome Statute, the crime of apartheid when committed as part of a widespread or systematic attack against the civilian population, with knowledge of the attack, amounts to a crime against humanity.⁵⁶

According to Article 7(2)(h), “the crime of apartheid’ means inhumane acts... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”. It has been proposed in a number of authoritative reports, including a 2017 report of the United Nations Economic and Social Commission for West Asia (ESCWA), that by virtue of their self-identification, Israeli-Jews constitute one racial group and the Palestinian people another, for the purpose of establishing apartheid.⁵⁷

Since 1948, Israel through a series of discriminatory legislative measures has engineered a regime of apartheid, on both sides of the Green Line.

55 The International Criminal Court pledged to “explore and pursue all links between cultural heritage and crimes against humanity, and charge crimes against or affecting cultural heritage as crimes against humanity whenever appropriate.” International Criminal Court, “Policy on Cultural Heritage,” 5, 23, June 2021

56 Article 7(1)(j), Statute of the International Criminal Court.

57 UN ESCWA, “Israeli Practices towards the Palestinian People and the Question of Apartheid Palestine and the Israeli Occupation, Issue No. 1” (2017) 20-25, available at: <<https://oldwebsite.palestine-studies.org/sites/default/files/ESCWA%202017%20%28Richard%20Falk%29%2C%20Apartheid.pdf>>; HRW, “A Threshold Crossed Israeli Authorities and the Crimes of Apartheid and Persecution” (2021), available at: <<https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>>; B’Tselem, “A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid” (2021), available at: <https://www.btselem.org/publications/fulltext/202101_this_is_apartheid>.

Such legislative measures preference Jewish nationality while dispossessing and transferring Palestinian property to Israeli Jewish control and denying fundamental freedoms including the right of return to Palestinians.⁵⁸ In the OPT, this is exemplified, by the transference of control over planning, zoning, and the mapping and surveying of archaeological sites by the military commander in conjunction with the Israeli Antiquities Authority-acts which exceed the military necessity and humanitarian requirements of the Hague and Geneva Conventions, and which concentrate control over priceless Palestinian antiquities for the purposes of Israeli-Jewish interests.⁵⁹

Inhuman acts of apartheid are further described under the Rome Statute as including persecution, which is the intentional deprivation of fundamental rights of the group. In Gaza, Palestinians are segregated and systematically oppressed under a prolonged closure, denied their basic human rights, including *inter alia* the freedom of movement. The imposition of measures calculated to prevent Palestinians in Gaza from participating in the cultural life of the country, including through the targeting of ancient cultural heritage sites, also constitutes a violation of Article II of the Apartheid Convention.⁶⁰

58 Al-Haq, "The Legal Architecture of Apartheid" (12 April 2021), AARDI, available at <<https://www.alhaq.org/advocacy/18181.html>>.

59 The Israel Antiquities Authority has mapped the entirety of Israel and the occupied territories, the West Bank, East Jerusalem, and the Gaza Strip into survey squares, each 100 sq km (10 x 10 km). Israel Antiquities Authority, 'The Archaeological Survey of Israel', <[https://survey.antiquities.org.il/index_Eng.html#/>](https://survey.antiquities.org.il/index_Eng.html#/) accessed 10 January 2022.

60 Article II (c), International Convention on the Suppression and Punishment of the Crime of Apartheid G.A. res. 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976.

3

Conclusion: Advancing Colonial Domination Through Cultural Erasure of Gaza Heritage

Israel's criminal enterprise in dealing with Palestinian cultural heritage is once again reflective of its overall apartheid regime perpetrated against the Palestinian people as a whole: under the veil of international legal instruments that it ratified without implementing them, Israel sets up two distinct standards tailored upon their added value to the entrenchment of the Zionist narrative over Palestinian lands. On one hand, cultural heritage sites that serve this narrative and are directly controllable by the Israeli Occupying Forces are appropriated and exploited to reinforce this narrative. On the other hand, cultural heritage sites that conflict with this narrative are, straightforwardly or not, targeted, damaged and destroyed, in an attempt to erase them from memory.

In light of the above, together with Forensic Architecture, Al-Haq calls on:

- The UN Special Rapporteur in the Field of Cultural Rights, Alexandra Xanthaki, to use her good offices to preserve and protect the Palestinian people's ability to preserve, protect and develop their cultural heritage, and more specifically to request a country visit to Palestine and report on Israel's violation of Palestinian cultural rights;
- For the Prosecutor of the International Criminal Court and the UN Commission of Inquiry to take into particular account Israel's practices of indiscriminate and systematic attacks on Palestinian cultural heritage artefacts, properties and sites;
- The Prosecutor of the International Criminal Court and the UN Commission of Inquiry to consider attacks on cultural property as amounting to war crimes, and evaluate their crucial contribution to inhumane acts of apartheid under the Rome Statute and where relevant, the Apartheid Convention and international human rights law;
- To that effect, for the Prosecutor of the International Criminal Court and the UN Commission of Inquiry to include Israel's targeting of cultural heritage into the ongoing investigations, establishing links

with other alleged violations under scrutiny, and to request a fact-finding mission to gather evidence of targeting of cultural heritage;

- The UN Educational, Scientific and Cultural Organization to use their good offices to organize the protection of Palestinian cultural property, as per Article 33(1) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict;
- Third States to recognize Israel's unlawful destruction of Palestinian cultural heritage, primarily in Gaza, as a fundamental element that enables Israel to further its colonial project in Palestine, and to entrench its apartheid regime over the Palestinian people as a whole and their lands by erasing their cultural identity as a people;
- United Nations community of States to exhort Israel to respect Palestinian cultural heritage and the Palestinian people's cultural rights;
- For international civil society to further support the Palestinian people's struggle to preserve their cultural identity by augmenting Palestinian voices.



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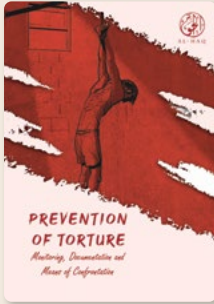
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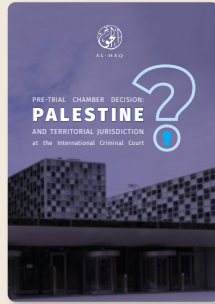
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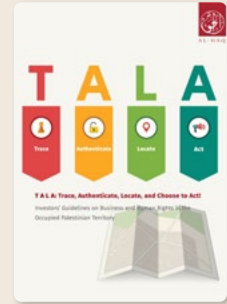
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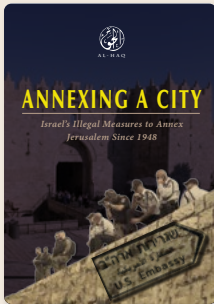
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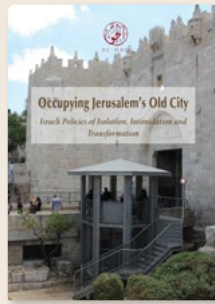
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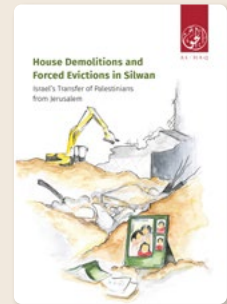
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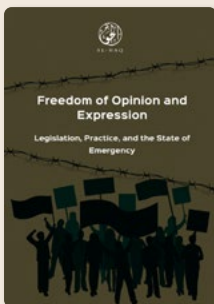
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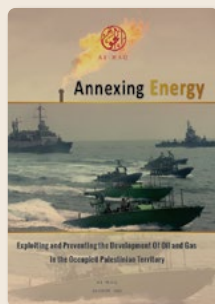
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AL - HAQ

About Al-Haq

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah in the Occupied Palestinian Territory (OPT). Established in 1979 to protect and promote human rights and the rule of law in the OPT, the organisation has special consultative status with the United Nations Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. Al-Haq conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. Al-Haq has a specialised international law library for the use of its staff and the local community.

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), ESCR-Net – The International Network for Economic, Social and Cultural Rights, the Palestinian Human Rights Organizations Council (PHROC), and the Palestinian NGO Network (PNGO). In 2018, Al-Haq was a co-recipient of the French Republic Human Rights Award, whereas in 2019, Al-Haq was the recipient of the Human Rights and Business Award. In 2020, Al-Haq received the Gwynne Skinner Human Rights Award presented by the International Corporate Accountability Roundtable (ICAR) for its outstanding work in the field of corporate accountability.

