

# UNESCO-Centered Management of International Conflict Over Cultural Property

By JAMES A. R. NAFZIGER\*

**T**RANSNATIONAL legal controls over the protection, use, enjoyment, and transfer of cultural property, particularly art and archaeological material, have developed steadily in recent years.<sup>1</sup> Despite this development, controls remain haphazard and dependent upon the rather unfettered discretion of sovereigns and intergovernmental and nongovernmental organizations. The most important of these organizations is the United Nations Educational, Scientific and Cultural Organization (UNESCO), whose role in a lengthy dispute over Israeli excavation in occupied Jerusalem is instructive to artists and lawyers alike.

While it is refreshing to read that "the entire world still follows with interest the news of any archaeological discoveries in Jerusalem,"<sup>2</sup> it is depressing to realize that the political world greets the news of any excavation there with a cynical eye. Action taken in 1974 by UNESCO, and the reaction to it, serve to confirm both the politicization of

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\* B.A., 1962, M.A., 1969, University of Wisconsin; J.D., 1967, Harvard University. Visiting Associate Professor of Law, University of Oregon School of Law.

1. See generally ART LAW: DOMESTIC AND INTERNATIONAL (L. Du Boff ed. 1975); Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 LAWYER OF THE AMERICAS 68 (1975); Nafziger, *Regulation by the International Council of Museums: An Example of the Role of Non-governmental Organizations in the Transnational Legal Process*, 2 DENVER J. INT'L L. & POL. 231 (1972); Comment, *The Legal Response to the Illicit Movement of Cultural Property*, 5 L. & POL. INT'L BUS. 932 (1973); Comment, *Legal Approaches to the Trade in Stolen Antiquities*, 2 SYRACUSE J. INT'L L. & COMM. 51 (1974); Note, *New Legal Tools to Curb the Illicit Traffic in Pre-Columbian Antiquities*, 12 COLUM. J. TRANSNAT'L L. 315 (1973); Note, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. INT'L L.J. 537 (1971); Note, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANSNAT'L L. 690 (1974).

2. THE BOOK AND THE SPADE: A GUIDE TO BIBLICAL ARCHAEOLOGY (M. Mansoor ed. 1975).

global cultural development and the fragility of the international legal framework for facilitating such development. After summarizing the dispute, this article will examine the elements of this legal framework, discuss why it collapsed during 1974, and suggest how it might be repaired and improved.

The controversy over the archaeological excavations in Israeli-occupied territory centers on activities in Jerusalem.<sup>3</sup> Excavations in this city commenced shortly after Israel assumed military control over the area following the termination of hostilities in 1967. Areas involved include land along the monumental Western Wall surrounding Har-ames-Sharif, which contains the two Moslem mosques of Al-Aqsa and the Dome of the Rock, and land in adjacent Moslem Waqf territory and in the old Jewish quarter. A primary aim of the excavations has been to "make a stratigraphic study of the site in order to reveal the history of ancient Jerusalem."<sup>4</sup> Particular goals have included exploration of areas adjacent to the Herodian Wall and examination of the lower strata presumably enclosing the First Temple, a site profoundly significant to Jewish culture.<sup>5</sup> With a few exceptions, the excavations have been conducted according to acceptable archaeological techniques and with due regard to divergent cultural and religious interests<sup>6</sup> although it has been determined that the excavations are not urgently needed to conserve these sites.<sup>7</sup> Despite this general care and concern, however, the Israelis have, in carrying out the excavations, destroyed certain property which, it is claimed, is of historical and cultural significance to the Arabs.<sup>8</sup> This claimed destruction of property led to the lengthy dispute,

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3. The legal status of Jerusalem is uncertain, but it is commonly agreed that it is occupied by Israel, and such was the assumption during this controversy. See generally Cole, *Property and the Law of Belligerent Occupation: A Reexamination*, 137 WORLD AFFAIRS 66, 68 (1974); Reyner & Philips, *Jerusalem: A Factual Background*, 137 WORLD AFFAIRS 326 (1975); Comment, *Israel: Conqueror, Liberator, or Occupier Within the Context of International Law*, 7 SW. U.L. REV. 206 (1975).

4. Observations of the Government of Israel on the Alleged Violations of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, UNESCO Doc. 87 EX/34 at 1 (1971) [hereinafter cited as Observations of Israel].

5. The Israeli government expressed its commitment to undertake the excavations more generally "for the sake of man's cultural heritage and its enrichment." *Id.* at 2.

6. See Report of the Director-General on the Implementation of 88 EX/Dec. 4.3.1, UNESCO Doc. 89 EX/19 Add. 2 (1972); Information Note Presented By the Director-General, UNESCO Doc. 88 EX/47 (1971); Communication from Professor H. J. Reinink, Commissioner-General for Cultural Property to Israel, UNESCO Doc. 87 EX/35 (1971).

7. See Information Note Presented By the Director-General, UNESCO Doc. 88/EX/47 at 3 (1971).

8. See Report of the Government of Jordan on the Violation of the Hague Con-

principally between Israel and Jordan, concerning the propriety and legality of the Israeli excavations.

In 1974 the UNESCO General Conference,<sup>9</sup> acting in the face of what it perceived as Israeli violations of resolutions and decisions of UNESCO and the United Nations General Assembly and Security Council, adopted two resolutions concerning Israel. The first<sup>10</sup> of these rejected an Israeli request to be included in UNESCO's European regional group,<sup>11</sup> and the second<sup>12</sup> invited the director-general<sup>13</sup> of UNESCO "to withhold assistance from Israel in the fields of education, science and culture until such time as it scrupulously respects the resolutions and decisions" of the Executive Board<sup>14</sup> and General Conference. The two resolutions neither excluded Israel from UNESCO nor lacked precedent in turning down, without prejudice, Israel's re-

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vention for the Protection of Cultural Property in the Event of Armed Conflict, UNESCO Doc. 88 EX/46 (1971); Report from the Government of Jordan on the Violation of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, UNESCO Doc. 87 EX/31 (1971). Israel responded: "Not only has there been no damage to Moslem cultural property but these excavations have unearthed, *inter alia*, interesting Moslem Umayyad remains. Arab workers are employed in the excavations, Arab students join the volunteer workers who assist the archaeologists and Arab visitors to the excavations include members of the Moslem Council in Jerusalem.

"The excavations present no danger whatsoever to Moslem religious buildings." Observations of Israel, *supra* note 4, at 2.

9. UNESCO is governed by a General Conference, an Executive Board and a Secretariat. Constitution of the United Nations Educational, Scientific and Cultural Organization, art. III, *opened for signature* Nov. 16, 1945, 61 Stat. 2495, T.I.A.S. No. 1580, 4 U.N.T.S. 275 [hereinafter cited as UNESCO Constitution]. The General Conference consists of representatives of member states. *Id.*, art. IV. It meets every two years to fix policies and to approve the program and budget for the next two years. *Id.*, art. IV(9).

10. UNESCO Doc. 18 C/VR 42, ¶¶ 51.1, 51.2 (prov. ed. 1974).

11. Regional groups have been established by UNESCO to carry out and decentralize the organization's activities. The groups conduct regional programs, centers, institutes, and other projects. Until 1973 the groups were organized on a very informal basis. In that year the Executive Board decided to organize them on a systematic basis and invited member countries to join in their classification. Criteria for Invitations to Regional Meetings, UNESCO Doc. 92 EX/Dec. 4.2 (1973).

12. UNESCO Doc. 18 C/VR 39, ¶¶ 124.9, 124.10 (prov. ed. 1974).

13. The director-general, who is nominated by the Executive Board and appointed by the General Conference, is the chief administrative officer of UNESCO. His specific duties include the formulation of proposals for appropriate action by the conference and board and the appointment of staff members. *See* UNESCO Constitution, *supra* note 9, art. 6.

14. The Executive Board, elected by the General Conference and acting under it, is responsible for the execution of the program adopted by the conference. Its specific duties include the preparation of an agenda and program of work for the conference, the recommendation to the conference of new members, and the presentation, after review, of the annual report of the director-general. *See id.* art. 5(B).

quest, thereby allowing Israel to reapply for membership in the European regional group at a later time. The votes on the resolutions generally conformed to familiar East-West and Arab-Israeli bloc patterns. The reaction of important elements in the press, cultural community, and UNESCO membership was immediate and most often hostile.<sup>15</sup>

UNESCO's action, excluding Israel from the European regional group and withholding assistance, raises questions of that organization's role in responding to international conflict over cultural property. The legal framework within which UNESCO's response to the Israeli excavations was fixed is a product of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>16</sup> and of certain United Nations and UNESCO resolutions. This framework will be examined, with emphasis on evaluating its capacity to contain conflict over cultural property and the role which it assigns to UNESCO, rather than on investigating the legality of past conduct.<sup>17</sup> After explor-

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15. The media responded with a spate of critical articles. See, e.g., Brickman, *UNESCO As A Politicized Agency*, 103 INTELLECT 451 (1975); Gillette, *UNESCO's Israeli Sanctions Arouse a Bitter Backlash*, 186 SCIENCE 1100 (1974); Heindel, *UNESCO in Politics*, 103 INTELLECT 361 (1975); Ripley, *The View from the Castle; Mankind's Natural and Cultural Legacy Threatened by International Policies*, 5 SMITHSONIAN, Mar. 1975, at 6; *Ravaging the UNESCO Charter*, 74 ART NEWS, Feb. 1975, at 89; Roche, *UNESCO vs. Israel: Playing Politics with Culture*, N.Y. Times, § 2 (Magazine), at 1, col. 1 (Dec. 29, 1974). The reaction of artists and other humanists was equally sharp: "Sixty-two leading figures in the arts and intellectuals, including 19 Nobel Laureates, have declared that they will not cooperate with UNESCO as long as that agency persists in its decisions to withhold aid to Israel and to exclude Israel from membership in any of UNESCO's regional groupings. The group, comprised of Christians as well as Jews, made its position known in an advertisement published in *The New York Times*." *Intellectual Opposition to UNESCO Policy: Withholding Aid to Israel*, 103 INTELLECT 347 (1975).

Several members of UNESCO, including the United States, reacted by restricting their ties with UNESCO. See *UNESCO and Israel*, 171 NEW REPUBLIC, Dec. 14, 1974, at 7 (France); N.Y. Times, Dec. 4, 1974, at 2, col. 4 (Switzerland); N.Y. Times, Jan. 12, 1975, § 1, at 1, col. 1 (United States). In the United States, the Senate Foreign Relations Committee voted to cut a \$16 million contribution to UNESCO from the foreign aid bill, the money to be restored only in the event that UNESCO rescinded its resolution. *UNESCO and Israel*, 171 NEW REPUBLIC, Dec. 14, 1974, at 7.

16. Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, done May 14, 1954, 249 U.N.T.S. 215 [hereinafter cited as 1954 Convention].

17. Another analysis, emphasizing the legality of the Israeli activity and UNESCO resolutions, identifies three questions: "1) whether Israel could legally conduct restoration work and archaeological excavations within occupied territories; 2) whether such activities endangered the religious and cultural heritage of the city; 3) if Israel's conduct was illegal, whether the withdrawal of assistance was an appropriate sanction." Lang, *UNESCO and Israel*, 16 HARV. INT'L L.J. 676, 677 (1975) [hereinafter cited as Lang]. The article concludes that "[t]he answer to the first question appears to be 'yes'; the answer to the latter two, almost certainly, 'no.'" *Id.*

ing this framework, the article will consider the appropriateness of the dispute-settlement techniques and sanctions relied upon by UNESCO and will evaluate alternative modes of responding to international conflict over activity involving cultural property. It will be suggested that UNESCO's prohibition of all excavations, rather than supervision of them, proved destructive to a settlement of the dispute.<sup>18</sup>

### The Legality of Israeli Excavation in Light of the 1954 Hague Convention and United Nations Resolutions

The preamble to the 1954 convention describes armed conflict as the underlying basis for invocation of the convention's provisions,<sup>19</sup> which have their roots in article 56 of the Hague Convention of 1907 Respecting the Laws and Customs of War on Land.<sup>20</sup> The 1954 convention provides for the settlement of disputes subject to it by means of a conciliation procedure, which allows for UNESCO assistance.<sup>21</sup>

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18. One commentator emphasizes that the most "sinister" aspect of the UNESCO affair was the pervasive indifference to scholarship, history, and truth: "In this there is no objectivity, no restraint in placing blame on only one side, when indeed it belongs to both." Ripley, *The View from the Castle*, 5 SMITHSONIAN, March 1975, at 6.

19. 1954 Convention, *supra* note 16, preamble, 249 U.N.T.S. 240.

20. The Hague Convention of 1907 provides:

"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." Convention with Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, art. 56, T.S. No. 539.

21. Article 22 provides:

"1. The Protecting Powers shall lend their good offices in all cases where they may deem it useful in the interests of cultural property, particularly if there is disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention or the Regulations for its execution.

"2. For this purpose, each of the Protecting Powers may, either at the invitation of one Party, of the Director-General of the United Nations Educational, Scientific and Cultural Organization, or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate on suitably chosen neutral territory. The Parties to the conflict shall be bound to give effect to the proposals for meeting made to them. The Protecting Powers shall propose for approval by the Parties to the conflict a person belonging to a neutral Power or a person presented by the Director-General of the United Nations Educational, Scientific and Cultural Organization, which person shall be invited to take part in such a meeting in the capacity of Chairman."

Article 23 provides:

"1. The High Contracting Parties may call upon the United Nations Educational, Scientific and Cultural Organization for technical assistance in organizing the protection of their cultural property, or in connexion with any other problem arising out of the

Upon the initiation of armed conflict, this scheme calls for the appointment of a commissioner-general for cultural property from an international list of qualified persons.<sup>22</sup> This procedure was followed in the instant dispute.

Article 5(1) of the 1954 convention, entitled "Occupation," provides that:

Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall *as far as possible* support the competent national authorities of the occupied country in *safeguarding and preserving* its cultural property.<sup>23</sup>

Article 1(a) defines cultural property as including archaeological sites.<sup>24</sup> The term "preserving" is not specifically defined, but in context it would seem to refer to the protection of cultural property, which article 2 defines as "the safeguarding of and respect for such property."<sup>25</sup> Article 3 defines safeguarding in terms of preparations in time of peace against the foreseeable effects of armed conflict.<sup>26</sup> Article 4

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application of the present Convention or the Regulations for its execution. The Organization shall accord such assistance within the limits fixed by its programme and by its resources.

"2. The Organization is authorized to make, on its own initiative, proposals on this matter to the High Contracting Parties." 1954 Convention, *supra* note 16, arts. 22-23, 249 U.N.T.S. 256, 258.

22. Article 6 of the regulations passed at the convention provides:

"1. The Commissioner-General for Cultural Property shall deal with all matters referred to him in connexion with the application of the Convention, in conjunction with the representatives of the Party to which he is accredited and with the delegates concerned.

"2. He shall have powers of decision and appointment in the cases specified in the present Regulations.

"3. With the agreement of the Party to which he is accredited, he shall have the right to order an investigation or to conduct it himself.

"4. He shall make any representations to the Parties to the conflict or to their Protecting Powers which he deems useful for the application of the Convention.

"5. He shall draw up such reports as may be necessary on the application of the Convention and communicate them to the Parties concerned and to their Protecting Powers. He shall send copies to the Director-General of UNESCO, who may make use only of their technical contents.

"6. If there is no Protecting Power, the Commissioner-General shall exercise the functions of the Protecting Power." Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, *done* May 14, 1954, 249 U.N.T.S. 272, 274.

The regulations are an "integral part" of "the procedure by which the . . . Convention is to be applied." 1954 Convention, *supra* note 16, art. 20, 249 U.N.T.S. 256.

23. 1954 Convention, *supra* note 16, art. 5, para. 1, 249 U.N.T.S. 244 (emphasis added).

24. *Id.* art. 1, para. a, 249 U.N.T.S. 242.

25. *Id.* art. 2, 249 U.N.T.S. 242.

26. *Id.* art. 3.

defines "respect for cultural property" in terms of restraints upon acts of negligence, hostility, theft, pillage, vandalism, and misappropriation directed against cultural property.<sup>27</sup> Although reading article two's definition of protection into article five's "preserving" would result in the redundant use of the word "safeguarding," the resulting interpretation seems most consistent with the primary goal of the convention as discussed below. Thus the meaning, and therefore the application, of article 5 requires reference to articles 2, 3, and 4, the definitional articles.

Both the text of the 1954 convention and its historical background,<sup>28</sup> particularly the Hague conventions of 1899 and 1907 and the Geneva convention of 1949, disclose that the 1954 convention's essential application is to the threat of actual bombardment. Construing the terms "safeguarding and preserving" in article 5 to be legally coextensive with the terms "safeguarding" and "protection" in articles 2 and 3 supports this interpretation, since, as stated, article 3 talks in terms of the foreseeable consequences of armed conflict. Article 3, however, is limited to conduct occurring in time of peace. It is arguable that the Israeli archaeological activities did not take place in time of peace and that therefore article 3, and through it article 5, do not apply.

If the convention is not invoked by article 5 because the conduct did not occur in time of peace, the convention may still be applied through article 18. That article provides that "[a]part from the provisions which shall take effect in time of peace," the convention shall apply whenever a declared war or armed conflict exists between two or more contracting parties, or whenever there is a partial or total occupation of the territory of a contracting party.<sup>29</sup> Nevertheless, even if the convention is applied through article 18, the convention's essential concern would be, as stated above, with conduct which looks toward meeting the threat of actual bombardment.

Finally, if one assumes that the excavations occurred in time of peace, a doubtful assumption, then article 5 does apply. Article 5, however, by reference to article 3, is concerned with preparations for the foreseeable effects of armed conflict. Thus, whether the convention applies through article 5 or article 18, the result is the same—a concern with conduct which looks toward preparation for armed conflict. Since Israel's archaeological activities are neither included within the activities proscribed by article 4 nor detrimental to safeguarding and preserving

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27. *Id.* art. 4, 249 U.N.T.S. 242, 244.

28. S. BAILEY, PROHIBITIONS AND RESTRAINTS IN WAR 65 (1972).

29. See 1954 Convention, *supra* note 16, art. 18, 249 U.N.T.S. 254, 256.

cultural property in time of peace from the foreseeable effects of armed conflict, it is difficult to apply the convention to Israel's nonmilitary archaeological activity, whether one adopts a textual approach or a contextual, purposive approach to interpretation.

It is arguable, however, that the phrase "safeguarding and preserving" in article 5 refers to a more comprehensive process of conservation unrelated to the presence of armed conflict, or a threat of it, within the occupied territory. Such an interpretation is strengthened by the apparent autonomy of article 5, addressed explicitly to the responsibilities of an occupying power. Moreover, Article 5(2) imposes a specific obligation upon an occupying power to preserve that portion of the cultural property in an occupied territory which is "damaged by military operations" whenever national authorities are unable to do so.<sup>30</sup> Since article 5(2) refers specifically to property damaged by military operations, it could be argued that article 5(1), which requires support in preserving cultural property, refers broadly to *all* cultural property, not only that which has been exposed to armed conflict; nor, for that matter, only that which might become exposed to such conflict, inasmuch as the term "safeguarding" covers such property.<sup>31</sup>

If the more comprehensive interpretation is given to article 5, it follows that simply because Israel was an occupying power of Jerusalem, the country was under an obligation "as far as possible" to support Jordan in safeguarding and preserving its cultural property, even in the absence of armed conflict. It is clear that Israel did not even consult, let alone support, Jordan, but there is no indication whether Jordan sought such support or whether there were in fact either prescriptive or proscriptive measures for Israel to support. In addition it is arguable, though not persuasive, that, given the tense political context Israel discharged her obligation as far as possible even though she did nothing in cooperation with Jordan.

It is frustratingly clear, therefore, that the convention is ambiguous when applied to the activities of an occupying power engaged in peaceful, scientifically commendable archaeological excavation. Available *travaux préparatoires* and other authoritative documentation do not clarify the intended scope of the convention. Nevertheless, the ambiguity of the convention arguably imposed an affirmative obligation on

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30. *Id.* art. 5, para. 2, 249 U.N.T.S. 244.

31. Article 18 of the convention refers to "provisions which shall take effect in time of peace," which would seem to include article 5. *Id.*, art. 18, 249 U.N.T.S. 254, 256.



Israel to apply the process of interpretation provided in the Vienna Convention on the Law of Treaties.<sup>32</sup> This obligation might arise, even though Israel is not a signatory of this convention, because the Vienna convention is, *de lege ferenda*, the best evidence of customary international law. Israel might argue, however, that the norms of the Vienna convention are so general that they do not dispose of the question of the country's obligations under the 1954 Hague convention. Thus traditional canons of interpretation would apply. Although the force of these canons is questionable under international law today,<sup>33</sup> sufficient ambiguity might persist even after the most thorough, bona fide analysis to permit Israel to invoke the rule *in dubito mitius*.<sup>34</sup> According to this rule, and despite the rule of effectiveness, which favors an interpretation which will give effect to a treaty, a meaning is preferred which is less onerous to the obligated party, in this case Israel. This rule is a version of the established presumption against restrictions on sovereignty. Moreover, the burden would seem to have fallen on Jordan to publish a reasoned "timeous notification" to Israel of its dissenting interpretation of the convention.<sup>35</sup>

There is little evidence to suggest that either Israel or Jordan fully satisfied its obligation to establish the validity of its position under international law. One might conclude, given the primitive state of the international legal process, that their failure to do so excused Israel from further obligation under the 1954 convention. On the other hand, Israel's apparent failures first to consult in good faith with Jordan as to the latter's interpretation of the convention and second to enter into conciliation or seek technical assistance from UNESCO pursuant to articles 22 and 23 of the convention<sup>36</sup> militate against such an excuse.

It would appear, therefore, that even if the convention did not clearly apply to Israeli archaeological excavations, there was sufficient textual ambiguity on the issue to have required Israel, as an occupying power, at the very least to assume the burden of undertaking an informed, unbiased inquiry into the country's responsibilities under the

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32. U.N. Doc. A/Conf. 39/27 (1969) (not yet in effect). In addition articles 31 and 32 of the Vienna convention govern the rules and means of interpretation, and article 65 establishes a procedure to be followed with respect to invalidity, termination, and withdrawal from or suspension of the operation of a treaty. *See id.*

33. *See, e.g.,* D. O'CONNELL, *INTERNATIONAL LAW* 251-53 (2d ed. 1970). *See generally* M. MCDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967).

34. *See* A. McNAIR, *THE LAW OF TREATIES* 462 (1961).

35. *Id.* at 429.

36. *See* 1954 Convention, *supra* note 16, arts. 22-23, 249 U.N.T.S. 256, 258.

convention. By failing to consult Jordan or, given the polarization of Middle Eastern politics, by failing to seek the counsel of UNESCO or another third party, Israel did not discharge the minimum duty imposed by the convention and therefore came before the UNESCO General Conference with the equities weighted against the country's archaeological activity.

In addition to the convention, the UNESCO General Conference rested its resolutions and decisions with respect to the Israeli excavations on United Nations authority. Resolutions 2253<sup>37</sup> and 2254<sup>38</sup> of the United Nations General Assembly call upon Israel to "rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem." The remarks of the representative of Pakistan, which sponsored resolution 2253, disclose an intent to prohibit any Israeli action accompanied by such measures as "the demolition of habitations."<sup>39</sup> Security Council resolutions 252,<sup>40</sup> 267,<sup>41</sup> and 298<sup>42</sup> proscribe similar activity which would "prejudice the rights of the inhabitants" or "change the status" of Jerusalem. Resolutions 267 and 298 proceed to define such change to include the "expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section."<sup>43</sup>

The proscribed activities, whether construed as an exhaustive list or merely as examples of the intended scope of the resolutions, do not appear to encompass *all* activity by Israel in Jerusalem. In the absence of widespread or unnecessary demolition of Arab habitations, it is reasonable to conclude that the archaeological excavations not only do not "prejudice the rights of inhabitants," taken as a whole, but rather enrich their lives and the lives of others. Furthermore, although the Israeli legislation providing for the excavations might be seen as "aimed at the incorporation of the occupied section,"<sup>44</sup> this interpretation is far from necessary. Clearer language in the resolutions might help overcome their limited force under international law, insofar as they now simply call upon Israel to take or refrain from taking certain action

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37. G. A. Res. 2253, 21A GOAR 5th Emer. Spec. Sess. Supp. 1, at 4, U.N. Doc. A/6798 (1967).

38. G. A. Res. 2254, *id.*

39. U.S. Dep't of State, Pub. No. 8367, in 10 DIGEST OF INT'L LAW 548 (M. Whiteman ed. 1968).

40. S.C. Res. 252, U.N. Doc. S/INF/23/Rev. 1, at 9 (1968).

41. S.C. Res. 267, U.N. Doc. S/INF/24/Rev. 1, at 3 (1969).

42. S.C. Res. 298, U.N. Doc. S/INF/27, at 6 (1971).

43. *Id.*; S.C. Res. 267, U.N. Doc. S/INF/24/Rev. 1, at 3 (1969).

44. S.C. Res. 298, U.N. Doc. S/INF/27, at 6 (1971).

without announcing a legal decision with binding force. As it is, the vaguely worded Security Council resolutions would appear to be a weak foundation upon which to build a case against Israel's archaeological excavations in Jerusalem. Nevertheless, these resolutions, like the 1954 convention, must be respected, and therefore did impose on Israel an obligation to obtain an authoritative interpretation of them before proceeding with the excavations.

### UNESCO's Response to the Conflict

At the beginning of the dispute over Israel's excavations, the UNESCO General Conference called on UNESCO member states to abide by the 1954 convention, and in addition directed Israel to conform to a 1956 recommendation of the General Conference concerning the international principles applicable in the case of archaeological excavations. Specifically, the General Conference called upon Israel:

- (a) to preserve scrupulously all the sites, buildings and other cultural properties, especially in the Old City of Jerusalem;
- (b) to desist from *any* archaeological excavations, the transfer of such properties and *any* change of their features or their cultural and historical character; and
- (c) to adhere scrupulously to the provisions of the above-mentioned Convention, Recommendation, resolutions and decisions . . . .<sup>45</sup>

As discussed above, it is unclear just what adherence to the convention required. Regardless of the convention's ambiguity, however, it is clear that Israel, by continuing its excavation, failed to abide by UNESCO resolutions and decisions.

In comparison to the action taken by the General Conference of UNESCO, the Executive Board's action was potentially more conciliatory, consistent with article 23 of the convention. That article allows signatories to call upon UNESCO for technical assistance either in protecting their cultural property or "in connexion with any other problem arising out of the application of the . . . Convention" and allows UNESCO on its own initiative to make proposals on these matters.<sup>46</sup> Broadly interpreted, technical assistance might encompass not only purely scientific aid but also whatever additional aid might be necessary for and helpful to resolving disputes concerning cultural property.

45. Report by the Director-General on the Implementation of Resolutions 3.342 and 3.343, UNESCO Doc. 83 EX/12 (1969). See also 15 UNESCO Gen'l Conf. Records, Resolutions, UNESCO Doc. 15 C/Res. 3.342 and 3.343 (1968).

46. See 1954 Convention, *supra* note 16, arts. 22-23, 249 U.N.T.S. 256, 258.

In a move apparently implementing the broadest policy of article 23, the Executive Board invited the director-general:

(a) to assist the parties concerned, both public and private, by technical advice *relating either to questions of general import or to particular, specific problems* and to supplement such advice by technical assistance designed to facilitate its application;

(b) *to seek the means of ensuring the rigorous and effective application of the said Convention, Recommendation, resolutions and decision;*

(c) to provide world public opinion with objective information on these matters with a view to enlightening its judgement and also to promote, in connexion with the preservation of Jerusalem, a vast movement of understanding and mutual respect between the cultures whose historical roots are there . . . .<sup>47</sup>

Unfortunately, the Executive Board's offer was interpreted by the parties in its narrowest sense. Israel accepted the offer of technical assistance in the form of an expert scientific mission,<sup>48</sup> but neither Israel nor its adversaries chose to view the Executive Board's offer broadly as including the provision of services designed to facilitate a settlement of the dispute. Furthermore, UNESCO itself did not exercise its authority to initiate proposals, aimed at resolving the dispute, although such a proposal could have concerned these services. Instead, the parties to the dispute spurned the conciliatory approach offered by the Executive Board's proposal, and UNESCO's involvement was limited to issuing formal legal statements which had questionable binding force rather than on fostering cooperative supervision of the excavations.

### **Appropriateness of the UNESCO Dispute-Settlement Techniques and Sanctions**

Notwithstanding the encouragement of both the 1954 convention and its own Executive Board to offer technical assistance, UNESCO continued over a span of some seven years to be primarily concerned with the legalistic niceties of the dispute and to be intent on restraining *all* excavation during the Israeli occupation of Jerusalem. This focus was ill-advised.

The director-general of UNESCO did effectively solicit and receive reports on the physical implications of the excavations. These reports were submitted by experts, including the commissioners general for

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47. Report by the Director-General on the Implementation of Resolutions 3.342 and 3.343, UNESCO Doc. 83 EX/12 (1969) (emphasis added).

48. See Report of the Director-General of UNESCO, UNESCO Doc. 18 C/VR3-1, ¶ 183; Report of the Director-General on the Implementation of 88 EX/Dec. 4.3.1., UNESCO Doc. 89/EX 19 Rev., at 4 (1972).

cultural property in Israel, Jordan, Lebanon, Syria, and Egypt<sup>49</sup> and a "special consultant to Jerusalem."<sup>50</sup> The reports tended to support the Israeli position that its excavations were being conducted in an unbiased, scientific manner, although they also reveal occasional lapses of creditable activity.<sup>51</sup> Unfortunately, the reports were either ignored or discounted by the Executive Board, as it continued to treat the dispute as a legalistic one. Thus, when the UNESCO decisions restraining all excavation were communicated to the Israeli government, it was only natural—and possibly, in view of the legal uncertainties, entirely acceptable—that they were met with polite but firm dismissals.<sup>52</sup> The Israeli responses, in turn, served to harden further the position of Israel's adversaries within UNESCO and to intensify their insistence upon ineffective injunctions against the Israeli excavations.

The adversary process by which UNESCO attempted to resolve the dispute led finally and perhaps inevitably to the adoption of the controversial 1974 resolutions against Israel. On the merits, the resolution which denied Israel's application for inclusion within the European regional grouping seems appropriate, in view of the criteria for classification and selection;<sup>53</sup> in view of previous rejections of applications by other member states;<sup>54</sup> in view of the lack of confidence expressed in Israel by the very members of the European group with which Israel, if made a member, would have had to work closely;<sup>55</sup> and incidentally, in

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49. See Lang, *supra* note 17, at 677-78.

50. Information Note Presented by the Director-General, UNESCO Doc. 88 EX/47, at 1 (1971).

51. See, e.g., *id.* at 5, ¶¶ 11, 12; Report of the Government of Jordan on the Violation of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, UNESCO Doc. 88 EX/46 (1971).

52. Letter from Abba Eban, Minister of Foreign Affairs of Israel, to the UNESCO Director-General, Jan. 6, 1972, in Report of the Director-General on the Implementation of 88 EX/Dec. 4.3.1., UNESCO Doc. 89 EX/19 Rev., at 4 (1972).

53. The criteria for regional grouping are (a) the country's interest in and ability to contribute to the activities of the region, thereby facilitating the tasks of the organization; (b) its geographical location; and (c) its historical, or cultural, or social traditions. Criteria for Invitations to Regional Meetings, UNESCO Doc. 92 EX/12 (1973) [hereinafter cited as Criteria for Invitations to Regional Meetings].

54. For example, the United States and Canada had been excluded from regional groups prior to 1974. Each had requested unsuccessfully at the seventeenth session of the General Conference in 1972 to participate in the Second Conference of Ministers of Education of European Member States. See A Statement on Israel by Amadou Mah-tar M'Bow, Director-General of UNESCO, 28 UNESCO COURIER 34 (Jan. 1975).

55. The Executive Board had emphasized "that the inclusion of a Member State in a region for the purpose of such participation cannot be obtained without the broad consent of the Member States in the region concerned." Criteria for Invitations to Regional Meetings, *supra* note 53, ¶ 8. Not including new members of the group, four-

view of Israel's Asian location—notwithstanding her inclusion in the Western European group for purposes of election to the Executive Board of UNESCO.<sup>56</sup>

The legality of the second resolution, calling for the director-general to withhold assistance from Israel for so long as the country failed to adhere to the proscriptive measures adopted by UNESCO, is questionable. The UNESCO constitution provides for (1) the suspension of a member's right to vote upon failure to meet financial obligations to the organization;<sup>57</sup> (2) the suspension of other rights and privileges upon request of the United Nations when similar actions have been taken by the United Nations;<sup>58</sup> and (3) expulsion from the organization when the member has been expelled from the United Nations.<sup>59</sup> Israel contended that since none of the conditions for sanctions were met, UNESCO was without power, on its own and without a United Nations mandate, to suspend a member from the exercise of rights and privileges. Since Israel considered the receipt of assistance from UNESCO as a right inhering in membership in the United Nations, it considered suspension of that right to be *ultra vires* of the UNESCO constitution.<sup>60</sup>

Proponents of the resolution, however, placed a different interpre-

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teen European group members voted in favor of the inclusion of Israel (Austria, Belgium, Denmark, Finland, Iceland, Ireland, Italy, Luxemburg, Netherlands, Norway, Sweden, Switzerland, United Kingdom, West Germany); ten voted against (Albania, Byelorussia, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Spain, Ukraine, U.S.S.R.); four abstained (France, Greece, Portugal, Turkey); and one was absent (Rumania). UNESCO Gen'l Conf., UNESCO Doc. 18 C/VR. 42, at 21-22 (prov. ed. 1974).

The importance of regional voting was underscored in October, 1975, when the Executive Board voted 23-3-3 to recommend to the General Conference that only the members of a particular geographic group be allowed to recommend membership in it. Had that rule been in effect in 1974, a recommendation of Israel's application for membership in the European group would have depended solely upon the voting of European group members and the plurality or majority required to make an affirmative recommendation. Clarity, *UNESCO's Board Votes for Softer Stand on Israel*, N.Y. Times, Oct. 9, 1975, at 1, col. 1.

56. A Statement on Israel by Amadou Mahtar M'Bow, Director-General of UNESCO, 28 UNESCO COURIER 34 (Jan. 1975). A sample of regional groupings in other specialized agencies of the United Nations shows that Israel was a member of two European groups (Food and Agriculture Organization; World Meteorological Organization) and two Asian-Middle Eastern groups (World Health Organization; International Labor Organization). Its Asian identification was reinforced by its participation in the Fifth Regional Conference of Asian National Commissions. Criteria for Invitations to Regional Meetings, *supra* note 53, at Annexes II, III.

57. UNESCO Constitution, *supra* note 9, art. IV(C)(8)(b).

58. *Id.*, art. II(3).

59. *Id.*, art. II(4).

60. Lang, *supra* note 17, at 679.

tation on the UNESCO constitution. They read article II, paragraph 4, which requires suspension of a member's rights and privileges whenever the United Nations has so acted and so requests, as being merely a mandate to UNESCO to honor such a request. Thus those supporting the resolution did not find article II, paragraph 4 to be a limitation by implication on the power to suspend a member's rights and privileges in other situations.<sup>61</sup> Finding no such limitation elsewhere in the constitution, those favoring the resolution asserted without further elaboration that the house was "authorized" to suspend a member's rights and privileges.

Aside from any question concerning the legality of the second resolution restricting assistance, the wisdom of that resolution is questionable from a purely practical viewpoint. Israel's contribution to UNESCO far exceeded any assistance it received from the organization.<sup>62</sup> Furthermore, in response to the second resolution, some member states reduced or terminated their contributions to UNESCO.<sup>63</sup> Thus passage of the second resolution not only failed to bring the parties any closer to resolving their dispute, but also hurt UNESCO financially.

### A Better Mode of Conflict Management

It is difficult to perceive how UNESCO's approach to dispute settlement, seeking to prohibit excavation altogether, could have been expected to achieve one of the basic purposes of the organization, "to contribute to peace and security by promoting collaboration among . . . nations. . . in order to further universal respect for justice, [and] for the rule of law . . . ."<sup>64</sup> Nor does UNESCO's approach appear to conform to two of the stated functions of the organization, to "give fresh impulse to popular education and to the spread of culture" and to "maintain, increase and diffuse knowledge; by assuring the conservation and protection of the world's inheritance of . . . works of art and monuments of history and science, and . . . by encouraging cooperation among the nations in all branches of intellectual activity . . . ."<sup>65</sup> By foregoing a cooperative, programmatic approach to the dispute in favor of a formal process leading to proscriptive resolutions,

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61. UNESCO Doc. 18 C/VR 39, ¶ 79.3 (prov. ed. 1974).

62. In 1974 Israel contributed \$195,000 and received \$26,000. Clarity, *UNESCO's Board Votes for Softer Stand on Israel*, N.Y. Times, Oct. 9, 1975, at 1, col. 1.

63. See Heindel, *UNESCO in Politics*, 103 INTELLECT 361 (1975).

64. UNESCO Constitution, *supra* note 9, art. I(1).

65. *Id.*, art. I(2).

UNESCO only hardened each party's position, rejected its own constitutional obligations, failed to resolve a serious conflict, tarnished its reputation as a nonpolitical body, and lost financial support, for its operations. By imposing self-defeating and legally questionable sanctions, UNESCO missed an opportunity to control the archaeological excavations in a manner more acceptable to all concerned.

Israeli activities in occupied territory remain controversial.<sup>66</sup> Since careful, scientifically acceptable archaeological excavation is of global value, however, an indefinite moratorium of the sort insisted on by UNESCO is not justified. Instead, UNESCO should attempt to depoliticize the dispute and, as emphasized by the director-general, should "always [seek] a consensus through patient and open dialogue."<sup>67</sup> With reference to the archaeological dispute, the director-general cautioned:

[I]n an organization devoted to education, science and culture, we must avoid those conflicts which take on the character of systematic confrontations. *We should perhaps also avoid the adoption of resolutions, even with large majorities, that could result in deep bitterness in certain quarters.*<sup>68</sup>

One method which UNESCO might have undertaken for avoiding systematic confrontations, and which it might still seek to implement, was suggested in 1971 by the UNESCO commissioner-general for cultural property to Israel. In the conclusion to his report, he called for the appointment of a committee of advisers, selected by an international body such as UNESCO, to supervise archaeological activity in the area.<sup>69</sup>

In addition to failing to heed the advice of the commissioner-general in 1971, UNESCO missed an opportunity to resolve the dispute when it failed to implement the decision of its own Executive Board to facilitate dialogue among the parties to the dispute and to provide technical assistance designed to promote international cooperation in the excavations. Although politics might still have intruded, a cooperative approach to the dispute, in the absence of clearly defined procedural and substantive guidelines, seems preferable to the formal, injunctive

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66. See, e.g., Adams, *Israeli Settlements: Obstacles to Peace?*, Washington Post, July 28, 1975, § A at 22, col. 3. In regard to recent Jordanian charges of Israeli acts of desecration of the Ibrahimi Mosque in Hebron, see U.N. Releases WS/723, at 4 (Aug. 15, 1975 and WS/724, at 4 Aug. 22, 1975).

67. Statement on Israel by Amadou Mahtar M'Bow, Director-General of UNESCO, 28 UNESCO COURIER 34 (Jan. 1975).

68. *Id.*

69. Communication from Professor H.J. Reinink, Commissioner-General for Cultural Property to Israel, UNESCO Doc. 87 EX/35, at 3 (1971).



approach taken by UNESCO. Given the fragility of its legal framework, UNESCO should employ techniques of dispute settlement such as conciliation and mediation rather than resorting to adversary proceedings resulting in unenforceable injunctions. Achieving the goal of dispute settlement is largely a matter of skillful conflict management.

