

## **PETITION FOR URGENT ACTION ON HUMAN RIGHTS VIOLATIONS BY ISRAEL: DESECRATION OF MA'MAN ALLAH (MAMILLA) MUSLIM CEMTERY IN THE HOLY CITY OF JERUSALEM**

The following complaint by representatives of families with ancestors buried in the Mamilla cemetery, supported by Palestinian and Israeli human rights organizational co-Petitioners, requests urgent action to halt all construction work in the cemetery, and declare the cemetery a cultural heritage site to be henceforth preserved and protected.

**Section I** summarizes the facts behind this complaint and explains the importance of cemeteries and burials in Islam.

**Section II** provides historical background on the Mamilla cemetery and details the acts of desecration that Israel has committed against the cemetery.

**Section III** puts the desecration of Mamilla in the context of a wider pattern of Israeli disregard for and disrespect of the cultural heritage of non-Jewish communities in the Holy Land.

**Section IV** explains the various actions taken by Palestinians and others to stop the desecration of the cemetery, and concludes that they have exhausted their remedies.

**Section V** presents an analysis of the human rights and humanitarian law violations that have occurred as a result of the desecration of the Mamilla cemetery.

**Section VI** concludes the complaint with a request for action from the bodies here addressed.

## I. INTRODUCTION

### A. Summary

The Petitioners respectfully request the Special Rapporteurs on Freedom of Religion and Belief and on Contemporary Forms of Racism, the Independent Expert on Cultural Rights, the High Commissioner for Human Rights, and the Director General of UNESCO to act urgently to demand that the Government of Israel cease the desecration and destruction of the ancient Mamilla Muslim cemetery in Jerusalem as a result of construction plans approved by Israeli municipal and regional planning authorities on portions of the cemetery. Petitioners further request that investigations be conducted to reveal the whereabouts of the hundreds of human remains exhumed in the process of construction on the cemetery, that the remains be recovered and reburied in coordination with the proper Muslim authorities, and that the cemetery be declared a protected heritage site.

The Mamilla cemetery is the largest and oldest Muslim cemetery in Jerusalem, in use from as early as the 7th century until 1948, when the State of Israel was established and it ceased to be accessible to its Muslim public trust custodians. Prior to this, the site was home to a Byzantine church, where Christian monks are believed to have been buried.<sup>1</sup> The cemetery grounds also contain numerous monuments, structures, and gravestones attesting to its hallowed history, including the ancient Mamilla Pool. The cemetery holds the remains of many thousands of Jerusalemites and important figures in Jerusalem's history and the history of the region, including judges, scholars, military leaders, and other dignitaries, among them ancestors of the current Petitioners. Its boundaries have been well delineated since the 1860s.

Israeli authorities have been complicit in the neglect, destruction, and desecration of the cemetery over six decades, in the face of strong public and legal protests by Palestinian, Israeli and international opponents of progressive encroachments. The most recent development project has resulted in the desecration of the cemetery through the exhumation and disposal of hundreds of graves and human remains in the process of the construction by the Simon Wiesenthal Center of Los Angeles, California, USA (SWC), of a so-called "Center for Human Dignity – Museum of Tolerance" over a section of the cemetery. The remains were exhumed and removed from the site during various phases of excavation and construction, and the means and location of their disposal have been concealed by the relevant Israeli authorities. The Israeli government, together with the Jerusalem Municipality and the Israeli Antiquities Authority (IAA), authorized construction on the site despite their full knowledge that the site is part of a historic Muslim cemetery deemed

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<sup>1</sup> See Chronicle of a Cemetery: Museum of Tolerance Planned on Muslim Heritage Site in West Jerusalem, The Alternative Information Center, Aug. 27, 2007, available at <http://www.alternativenews.org/english/982-chronicle-of-a-cemetery-museum-of-tolerance-planned-on-muslim-heritage-site-in-west-jerusalem.html>.

an antiquity, and against the recommendations of the IAA's own Chief Excavator, entrusted with the excavation, that construction should be prohibited because of the cemetery's historical and archeological significance. The Israeli Supreme Court ratified this decision based on misleading information presented by the IAA and the SWC in responding to a legal action mounted by another group of plaintiffs to stop construction. These actions by various Israeli local, national and judicial authorities constitute violations of the human rights of all Palestinians and Muslims, whose forbears are buried in this cemetery, and of innumerable Muslim Palestinians from Jerusalem who have direct ancestors buried there, some of the Petitioners among them. They also violate the rights of people of all faiths and backgrounds who believe that ancient and historically important cemeteries such as Mamilla are part of the cultural heritage of humanity, and should be protected and preserved for the benefit of all. These human rights protections include the right to protection of cultural heritage and property, the right to freedom from discrimination, the right to freedom of religion and belief, and the right to culture and family.

## **B. Muslim Customs and Religious Beliefs**

In order to understand the import of Israel's actions in the Mamilla cemetery to the Petitioners, it is necessary to explain Muslim customs and beliefs regarding burials and the sanctity of cemeteries. Death is considered an important stage of life for Muslims, who believe that the soul lives on after death. A proper Islamic burial is therefore imperative for Muslims. There are specific rites that are performed when a Muslim dies, which include the washing, shrouding and burial of the body as soon as possible, preferably the same day as the death, and according to prescribed methods. As for the burial, for Sunni Muslims, the grave must be perpendicular to the qibla, or the direction of prayer, and the deceased's head must be facing the qibla, with the body turned on its right side. The body should be buried without a casket, where permitted by law.<sup>2</sup>

Burial of the dead in Islam, as in most religions, is an act to which much religious significance is attached. The rituals associated with burial are an integral part of the "shari'a," or the path ordained by God for Muslims to follow. Its significance extends to both the deceased, who are put in their final resting place until the Day of Judgment, and to the living, who prepare the body of the deceased for the final reckoning, and pray over the soul of the dead, asking for God's mercy on their behalf.<sup>3</sup> The desecration of remains of the dead is therefore an affront not only to the dignity of the dead, but also to those who buried them in the confidence that they would remain where they were interred.

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<sup>2</sup> See Bilal Abu Aisha, Funeral Rites and Regulations in Islam, available at <http://www.missionislam.com/knowledge/funeral.htm>

<sup>3</sup> *Id.*

According to Islamic jurisprudence, disinterment of the dead is strictly forbidden, and such actions constitute grave disrespect to the dead and their living descendants.<sup>4</sup> Moreover, the sanctity of cemeteries is eternal. Such sanctity cannot be “suspended by the passing of time, and its sanctity cannot be changed until Judgment Day. Therefore, it is stated that there is an absolute prohibition on digging up graves and this is according to the learned opinion of Shari’a scholars without exception.”<sup>5</sup> Such an insult as the removal of human remains from their graves does not stop at the direct descendants of the deceased, who in this case include the Individual Petitioners, but has implications for Muslims everywhere when acts of desecration are committed in blatant disregard for the sanctity of their burial customs and sites. The disrespect involved in exhuming human remains from cemeteries also signals to other groups that similar treatment of religious sites is permissible, and thus threatens protection of the religious sites of others as well.

It is customary for Muslims to visit the graves of relatives and ancestors, and to pray for the dead. The visitation of graves and prayer at gravesides is mentioned in the Quran and in the Sunnah of the Prophet Muhammad.<sup>6</sup> Muslim Palestinians, including some of the present Individual Petitioners whose ancestors’ graves remain visible, have continued to visit their relatives buried in Mamilla cemetery down to the present.<sup>7</sup> Photographs of the still-preserved sections of the cemetery attest to the renovation and replacement of headstones of those graves still identifiable by living relatives.<sup>8</sup>

The Individual Petitioners are descendants of individuals buried in Mamilla who are deeply offended by the desecration of hundreds of graves in the

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<sup>4</sup> Judge Ahmad Natour, Letter from President of the Shari’a Court of Appeals to Gershon Baskin, available at <http://www.ipcri.org/files/qadi.html>, attached as Appendix III [hereinafter Judge Natour Letter].

<sup>5</sup> Id. (citing judgments issued by Israeli Shari’a courts and a fatwa issued by all Shari’a judges in Israel in 1994 stating that the sanctity of cemeteries is eternal until the end of time). See also Shaikh ‘Akrama Sabri, Fatwa Shari’a fi tahrir al-i’tida’ ‘al al-maqabir, Mar. 20, 2004, (prohibiting destruction of graves), attached as Appendix IV.

<sup>6</sup> See Translation of Sahih Muslim, Book 4: The Book of Prayers, available at <http://www.usc.edu/schools/college/ccrc/engagement/resources/texts/muslim/hadith/muslim/004.smt.html>:

Book 4, no. 2130: Abu Huraira reported: The Apostle of Allah (may peace be upon him) visited the grave of his mother and he wept, and moved others around him to tears, and said: I sought permission from my Lord to beg forgiveness for her but it was not granted to me, and I sought permission to visit her grave and it was granted to me! So visit the graves, for that makes you mindful of death.;

Book 004, Number 2128: Sulaiman b. Buraida narrated on the authority of his father that the Messenger of Allah (may peace be upon him) used to teach them when they went out to the graveyard. One of the narrators used to say this in the narration transmitted on the authority of Abu Bakr: "Peace be upon the inhabitants of the city (i. e. graveyard)." In the hadith transmitted by Zuhair (the words are): "Peace be upon you, the inhabitants of the city, among the believers, and Muslims, and God willing we shall join you. I beg of Allah peace for us and for you."

Book 004, Number 2119: Abu Huraira reported Allah’s Messenger (may peace be upon him) as saying: It is better that one of you should sit on live coals which would burn his clothing and come in contact with his skin than that he should sit on a grave.

<sup>7</sup> Raed Duzdar recently renovated the gravestone of his ancestor, Ahmad Agha Duzdar, who was Governor of Jerusalem in the 19th century. The new gravestone was destroyed only weeks after it was erected. Badr Khalidi attested to having visited the grave of his ancestor, Mohammed Shamseddine al-Khalidi al-Dairi, interred in Mamilla in 1401 A.D. See List of Petitioners, attached as Appendix I. See also, Martin Patience, Row over Israeli tolerance Museum, BBC NEWS, Feb. 17, 2006 (quoting Mohammed Hamdi Bader, who visited his grandfather’s grave regularly to pray by it).

<sup>8</sup> See photographs of renovated headstones, Appendix VIII.B.

cemetery, potentially belonging to their ancestors.<sup>9</sup> They, like millions of other Palestinians and Muslims, are gravely distressed by the desecration of Muslim graves and remains, and perceive Israel's indifference to the cemetery's historical, cultural and religious importance as a symbol of its lack of respect for the holy sites of other religious groups, including Muslims and Christians. All of the Petitioners believe that Israel's disrespect of a historically and religiously important cemetery such as Mamilla jeopardizes the sanctity of other cemeteries and other religious sites belonging to all faiths.

## II. BACKGROUND

### A. History of the Jerusalem Mamilla Cemetery

The Mamilla cemetery is the largest and oldest Muslim cemetery in Jerusalem. It was recognized as a Muslim cemetery as early as the 7th century, and is said to hold remains of several of the Prophet Muhammad's companions.<sup>10</sup> Prior to this, the site was home to a Byzantine church, where Christian monks are believed to have been buried.<sup>11</sup> It is historically attested that the cemetery holds the remains of eminent scholars and Jerusalem notables going back over 1000 years, as well as of noted military leaders from the army of Saladin in the 12th century.<sup>12</sup> The cemetery was in active use at least as late as 1927, when the Muslim Supreme Council deemed it a historical site to be preserved and properly maintained.<sup>13</sup> The President of the Israeli Shari'a High Court of Appeals in Jerusalem, Ahmad Natour, attested that it continued to be used as a cemetery as late as 1948.<sup>14</sup> The cemetery grounds also contain numerous monuments, structures, and gravestones attesting to its hallowed history, including the ancient Mamilla Pool, which operated as a cistern for the city of Jerusalem from the first century B.C.<sup>15</sup>

The boundaries of the cemetery have been clearly delineated since the 1860s, during the Ottoman administration of Palestine, by means of a wall and a road surrounding it. These boundaries were fastidiously respected by the Ottomans and the British, and were not encroached upon during the first years of Israeli rule.<sup>16</sup>

The ownership of the land was uncontested and uninterrupted until 1948, when the State of Israel was established. As with all Muslim cemeteries

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<sup>9</sup> See List of Petitioners, attached as Appendix I.

<sup>10</sup> See Charmaine Seitz, *Paradise and Gehenna Keep Close Company in the Sanctuary of God*, 6:1 JERUSALEM QUARTERLY, at 61; Saree Makdasi, *The Architecture of Erasure*, CRITICAL INQUIRY, Spring, 2010, at 3, available at <http://criticalinquiry.uchicago.edu/issues/makdasi.pdf>.

<sup>11</sup> See *Chronicle of a Cemetery*, supra note 1.

<sup>12</sup> For a list of famous individuals buried in Mamilla, see Asem Khalidi, *The Mamilla Cemetery: A Buried History*, 37 JERUSALEM QUARTERLY, Spring, 2009, at 107–108.

<sup>13</sup> *Id.* at 105.

<sup>14</sup> Judge Natour Letter, supra note 4, Appendix III.

<sup>15</sup> See *Chronicle of a Cemetery*, supra note 1.

<sup>16</sup> Yehoshua Ben-Arieh, *The Tolerance Museum and the Mamilla Cemetery: The Plain Facts*, January, 2009, available at <http://www.ipcri.org/files/yehoshua-eng.html>.

in Palestine, Mamilla was an Islamic endowment, or public waqf, a fact confirmed by a 1938 British Mandate registration certificate in the name of the Trustee of the Islamic Endowment (waqf).<sup>17</sup> It was recorded as one undivided bloc of land (Bloc. No. 30036, Plot No. 1), with an area of 134.5 dunums (approximately 33 acres).<sup>18</sup> In 1944 the British Mandatory authorities declared the cemetery an antiquities site.<sup>19</sup> After 1948, the site was expropriated by the Israeli Custodian of Absentee Property, which handled all Palestinian land seized by the government in post-1948 Israel. It was later transferred to the Israel Lands Authority, which subsequently transferred it to the Jerusalem Municipality in 1992.<sup>20</sup> The Israeli government and the Jerusalem Municipality gifted part of the cemetery to the Simon Wiesenthal Center (SWC), and approved plans for the “Center for Human Dignity – Museum of Tolerance” on the site.

Despite recent attempts to denigrate the sanctity of the cemetery and its importance to Muslims, Israeli authorities have, in the past, recognized the entire cemetery grounds as a site of great historical and religious importance. In a response to official Jordanian protests against desecration of the cemetery in 1948, the newly established Israeli Religious Affairs Ministry admitted the cemetery’s great importance to the Muslim community, stating that it “is considered to be one of the most prominent Muslim cemeteries, where seventy thousand Muslim warriors from Salah al-Din al-Ayubi’s armies are interred along with many Muslim scholars. Israel will always know to protect and respect this site.”<sup>21</sup> In 1964 Israel designated the cemetery as an antiquities site.<sup>22</sup> Later encroachments by Israel led to a petition by Palestinians to UNESCO in 1986. In responding to the deconsecration of the site and that, on the contrary, the site and its tombs are to be safeguarded.<sup>23</sup> Most recently, in 2002, the Israeli Antiquities Authority (IAA) recognized the Mamilla cemetery as a “Special Antiquities Site” in Jerusalem and determined it to be a site of especially high value with “historical, cultural and architectural importance,” on which there should be no development, and which should be rehabilitated and maintained.<sup>24</sup>

In spite of this apparent awareness of both the cemetery’s sanctity and its historical value, Israel has gradually expropriated and destroyed most of the cemetery. Over the six decades that Israel has controlled the cemetery

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<sup>17</sup> See Certificate of Registration for the Mamilla Cemetery in the Jerusalem Land Registry, 1938, attached as Appendix V.

<sup>18</sup> *Id.* See also Ben-Arieh, *supra* note 16.

<sup>19</sup> See Petition to the Supreme Court of Israel, In the Matter of The Committee of Families of the Dead Buried in the Maaman Allah (Mamilla) Cemetery, et. al., High Court of Justice File 3227/09, April 16, 2009, at para. 52 [hereinafter 2009 High Court Petition].

<sup>20</sup> Makdasi, *supra* note 10, at 8.

<sup>21</sup> Ben Arieh, *supra* note 16; Akiva Eldar, Israel Prize laureate opposes Museum of Tolerance, HA'ARETZ, Dec. 31, 2008, available at <http://haaretz.com/hasen/spages/1051047.html>.

<sup>22</sup> 2009 High Court Petition, *supra* note 19, at para. 52.

<sup>23</sup> UNESCO, Executive Board, Jerusalem and the Implementation of 23C/Resolution 11.3, 125 EX/15, July 17, 1986, Addendum 1, at 7 [hereinafter 1986 UNESCO Report].

<sup>24</sup> 2009 High Court Petition, *supra* note 19, at paras. 61–77.

and prevented Muslims from maintaining it, its situation has deteriorated significantly, with only a handful of grave markers remaining visible, in contrast to the thousands that were there in 1948.<sup>25</sup> The Mamilla cemetery has been slowly encroached upon by the Israeli state, beginning in the 1960s when about half of it was turned into “Independence Park.” A parking lot was built over another part of the cemetery in 1964, constituting part of the plot on which the Museum site is located.

The building of the parking lot was itself illegal, in violation of a 1951 Israeli government decision forbidding Muslim mosques and cemeteries to be transferred.<sup>26</sup> It was nonetheless justified by a ruling obtained in 1964 from a Muslim judge in Jaffa, employed by the Israeli state, who agreed to publish a decision that the cemetery was no longer sanctified. This ruling, however, has been proven to be invalid based on the fact that remains were clearly still intact then, as they are now. The Muslim religious–legal requirements for de–sanctifying a cemetery, namely that the cemetery be thoroughly investigated, that no bones be found, and that fresh remains be allowed to be placed there, were clearly not met in this case. Moreover, such findings would not have allowed for the cemetery to be used for purposes other than reusing grave sites deemed abandoned for new burials.<sup>27</sup> The Israeli–appointed judge’s legitimacy was also negated by his conviction for fraud in the same year of the decision.<sup>28</sup> The current President of the Israeli Shari’a Court of Appeals has pronounced this 1964 decision null and void, and has confirmed that cemeteries never lose their sanctity in Islam.<sup>29</sup>

Other past encroachments onto the cemetery include the building of a school and playing field in the northwest corner, the building of an underground parking garage in the 1980s, the building of access roads through the cemetery, excavations in 2005 to lay electric cables, and use of a portion of it as the premises of the Israeli Ministry of Trade and Industry.<sup>30</sup> Thus, the designation of the cemetery as an antiquities site and Israel’s past recognition of the cemetery’s significance has failed to protect it, as evidence by the continuing encroachments on it, the poor state of the still visible portion of the cemetery, and the IAA’s most recent actions in releasing part of the cemetery for construction of the Museum.

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<sup>25</sup> Khalidi, *supra* note 12, at 105. See Appendix VII, comparing aerial photos and maps of the cemetery in 1951 and at present, and showing the extent of development on the cemetery since 1948.

<sup>26</sup> Netty C. Gross, *Grave Thoughts: What lies beneath the dispute over the Museum of Tolerance in Jerusalem?*, THE JERUSALEM REPORT, January 5, 2009, at 24.

<sup>27</sup> *Id.*

<sup>28</sup> See Judge Natour Letter, *supra* note 4, Appendix III. See also Jonathan Cook, *Travesty of tolerance on display*, ALJAZEERA MAGAZINE, available at [http://aljazeera.com/news/articles/42/Travesty\\_of\\_tolerance\\_on\\_display.html](http://aljazeera.com/news/articles/42/Travesty_of_tolerance_on_display.html) (noting the lack of legitimacy and widespread corruption among Islamic officials appointed by Israel “because of their willingness to do the government’s bidding rather than because of their public standing or Islamic credentials.”)

<sup>29</sup> Judge Natour Letter, *supra* note 4, Appendix III.

<sup>30</sup> Khalidi, *supra* note 12, at 105. See Appendix VII.B, a 2010 aerial photograph indicating the location of some of these developments.

Contrary to the claims of proponents of the Museum project that there was never any opposition to previous construction on the cemetery,<sup>31</sup> there has been sustained opposition by members, leaders and organizations of Palestinian communities in Israel and the Occupied Palestinian Territory, including East Jerusalem, throughout all of the above-mentioned incursions into the cemetery. This opposition has come from Islamic waqf authorities and other religious institutions, members of Jerusalem families with ancestors buried in the cemetery, and civil society organizations.

After the establishment of Israel in 1948, the Jordanian government officially protested desecration of the cemetery.<sup>32</sup> Until the lifting of military rule imposed on them from 1948 to 1966, Palestinians who were able to remain inside territory seized by Israel in 1948 were not in a position to challenge Israeli control over the cemetery, given the decimation of the Palestinian population, the Palestinian community's consequent political and social weakness after 1948, and the severe restrictions on movement and organizing placed on Palestinians inside Israel by military laws.

In 1958, attempts by Israel to build a stage in the cemetery for independence celebrations were averted by a request, ultimately heeded, from the Advisory Council on Muslim Affairs to change its location.<sup>33</sup> In 1967, however, Israel rejected a petition by the (Jordanian) Islamic Waqf Department in Jerusalem requesting permission to maintain the Mamilla cemetery after 20 years of neglect by the Israeli state after 1948, and instead proceeded to establish Independence Park over much of the cemetery.<sup>34</sup> There was also outrage expressed at the desecration resulting from the building of the parking lot on Mamilla grounds in the 1960s. Waqf officials and other Jerusalemites witnessed the remains scattered from the Israeli construction, which they gathered to rebury.<sup>35</sup>

Palestinians have also petitioned international organizations in their attempts to prevent development on Mamilla grounds. Building operations in the cemetery in the 1980s were the subject of urgent communications to the United Nations Educational, Scientific and Cultural Organization (UNESCO) to assist in stopping the destruction of the cemetery, which ultimately produced no results.<sup>36</sup> In the late 1980s, as new portions of the cemetery were destroyed for the construction of a car-park, the Muslim waqf authorities held a public conference attended by the international press and Consuls based in Jerusalem to protest the desecration, during

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<sup>31</sup> Such false claims were accepted unreservedly by the Israeli High Court in its decision allowing resumption of construction of the Museum, in disregard of the evidence to the contrary. See *Al-Aqsa Association for the Development of the Assets of the Muslim Waqf in the Land of Israel Ltd. v. the Simon Wiesenthal Center Museum Corp.*, judgment dated October 29, 2008, High Court of Justice File 52/06 (stating that no objections were made concerning the sanctity of the site during previous development projects) [hereinafter *Al-Aqsa Assoc. judgment*].

<sup>32</sup> See *supra* note 21 and related discussion.

<sup>33</sup> Eldar, *supra* note 21.

<sup>34</sup> Khalidi, *supra* note 12, at 105.

<sup>35</sup> *Id.* at 106. See attached photograph, Appendix VIII.C.

<sup>36</sup> See 1986 UNESCO Report, *supra* note 23.



which human bones that had been collected from the despoiled cemetery site by the waqf authorities were displayed.<sup>37</sup> Amir Cheshen, former Arab-Affairs Advisor to Jerusalem Mayor Teddy Kollek from 1984–94, confirmed that “During the excavation human remains were uncovered and this brought about considerable distress and a public uproar among the Arab residents of East Jerusalem. In addition, the Steering Committee of Israeli Arabs found it appropriate to file a protest.”<sup>38</sup> Palestinians and religious institutions also publicly protested the transfer of the cemetery land to the Jerusalem Municipality in 1992.<sup>39</sup> As Cheshen attested:

it is clear that Islamic stakeholders, particularly in Jerusalem, also among the Muslim community both in Israel and abroad, never abandoned their interest in what transpired in the cemetery, nor their sensitivity in this regard. And they always viewed construction that damaged the tombs and human remains as a violation of sanctity and their religious sensibilities.<sup>40</sup>

The most recent encroachment onto the cemetery, the “Center for Human Dignity – Museum of Tolerance” project, has also generated much controversy, and has been the subject of numerous lawsuits and public protests in Israel and internationally. The present Complaint is consistent with the history of protest by Palestinians and others against Israeli encroachments and desecration of the cemetery. Failure to stop the current construction, which aims to erect a large modern structure atop this ancient cemetery, will surely pave the way for other similar projects atop the graves and remains of centuries of Muslims who were buried in this cemetery in Jerusalem, in flagrant violation of relevant international human rights law, as well as numerous United Nations resolutions on Jerusalem, going back to the establishment of the State of Israel.

## **B. The Desecration Inflicted by the “Center for Human Dignity – Museum of Tolerance” Project**

### **1. The Museum Project Has Resulted in the Exhumation of Hundreds of Graves and Remains**

The progressive infringements on the Mamilla cemetery by Israeli authorities since the 1960’s have culminated in the latest project, authorized and supported by Israeli state authorities and upheld by the Israeli High Court in 2008.<sup>41</sup> This project to erect a “Center for Human

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<sup>37</sup> This was attested to in the memoirs of the last Jordanian mayor of Jerusalem, Anwar al-Khateeb al-Tamimi, *With Saladin in Jerusalem*, published in 1989.

<sup>38</sup> *Ir Amim, Jerusalem Bulletin, Special Edition*, Jan. 5, 2008, available at <http://www.ipcri.org/files/tolmuseriramim.html> (citing Chechen’s opinion submitted to the Israeli High Court) [hereinafter *Ir Amim Jerusalem Bulletin*].

<sup>39</sup> See Makdisi, *supra* note 10, at 8.

<sup>40</sup> *Ir Amim Jerusalem Bulletin*, *supra* note 37.

<sup>41</sup> See *Al-Aqsa Assoc. judgment*, *supra* note 31 (ruling that erection of the Museum is lawful and imposing conditions on the disposition of remains in areas of the site the Court was told contained remains). See Section II.B. below for a discussion of how the Court was misled regarding the number and distribution of human remains located under the entire site.

Dignity – Museum of Tolerance” on a cemetery site containing thousands of Muslim remains has predictably resulted in severe desecration at various stages of the construction process.<sup>42</sup>

The Museum project was approved to be built by the Municipality on the previously paved over car park in 2002, on about 14 dunums (3.5 acres), over 10 per cent of the total area of the cemetery.<sup>43</sup> The government reportedly informed the SWC that the plot was open public land, and provided it with the necessary permits to build there.<sup>44</sup> The Museum plan was approved as part of a broader plan to “develop” central Jerusalem.<sup>45</sup> The groundbreaking ceremony was held in May, 2004, and digging on the site began in 2005. The planning process itself was conducted with much secrecy, as are other controversial planning projects in Israel, and was already “approved before being presented in full to the Israeli public...once they were already a fait accompli.”<sup>46</sup>

Both the Israeli government and the SWC had full knowledge of the fact that the building site was part of the historical Mamilla cemetery. As Gideon Suleimani, the archaeologist appointed by the Israel Antiquities Authority (IAA) to excavate the construction site stated, among IAA officials, “The Mammilla cemetery is known as an antiquities site and a burial site in Jerusalem ever since the period of the Crusades.”<sup>47</sup> Prior to any work being done on the site, the IAA, at the behest of Suleimani, dug test trenches on the designated project site, which revealed “that the entire area “abounded with graves,” and that under the parking lot there was a crowded Muslim cemetery, containing three or four layers of graves.”<sup>48</sup> SWC representatives were apprised of this fact.<sup>49</sup>

Despite this discovery, groundbreaking work in preparation for construction was conducted, resulting in the disinterment of at least two hundred graves and human remains, buried according to Muslim rites, which dated back to the Mamluk period of Islamic history, or the 12th century B.C.<sup>50</sup> The whereabouts of these remains are currently

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<sup>42</sup> See photos of exhumed and exposed graves and human remains on the construction site, Appendix VIII.A.

<sup>43</sup> See 2010 aerial photograph, Appendix VII.A, highlighting the original boundaries of the cemetery and indicating the location of Museum site.

<sup>44</sup> Elana Brownstein and Amir Mizroch, Ruling expected on Tolerance Museum construction, JERUSALEM POST, February 19, 2006, available at [http://www.jpost.com/servlet/Satellite?apage=1&cid=1139395439285&page\\_name=JPost%2FJPArticle%2FShowFull](http://www.jpost.com/servlet/Satellite?apage=1&cid=1139395439285&page_name=JPost%2FJPArticle%2FShowFull)

<sup>45</sup> The development plan also includes plans to build malls and luxury housing in the area, which is centrally located. The development plan is itself controversial, given the undetermined legal status of Jerusalem, and the nature of the development, which aims to erase the Palestinian presence in the city and replace it with an Israeli presence, in part to solidify Israel's control over Jerusalem, which both Palestinians and Israelis claim as their capital. See Chronicle of a Cemetery, supra note 1.

<sup>46</sup> Esther Zandberg, The Architectural Conspiracy of Silence, HAARETZ, Feb. 24, 2007, available at <http://www.haaretz.com/hasen/spages/825662.html> (noting the secrecy with which the planning sector operates in Jerusalem and elsewhere).

<sup>47</sup> Affidavit of Gideon Suleimani, Israel Antiquities Authority's Chief Excavator at the project site, at para. 6.6. Attached as Appendix II [hereinafter Suleimani Affidavit]. At the time that he ordered the test trenches, Suleimani was the Director of the Israeli Antiquities Authority Jerusalem District. In 2005, he was appointed Chief Excavator at the Museum site. Suleimani has worked with the IAA in various capacities since 1990. See Suleimani Affidavit, at paras. 1-4, Appendix III.

<sup>48</sup> Id. at para. 6.5.

<sup>49</sup> Id., at para. 6.6.

<sup>50</sup> See 2009 High Court Petition, supra note 19, at para. 19.

unknown. The degrading manner with which these remains were dealt shows a blatant disrespect for the sanctity of those buried and their living descendants. It was only after these exhumations were publicized that Palestinians, Muslims, Israelis, and others, the Petitioners among them, realized the implications of the desecration the project was inflicting on the Mamilla cemetery.

Once this desecration was revealed in the Israeli press, the Israeli Antiquities Authority (IAA) began excavations to determine whether to allow construction to continue based on the site's antiquity. The IAA's subsequent partial excavation of the site to determine whether to release it for construction unearthed hundreds more human remains. At an early stage of the excavation, the Chief Excavator Suleimani submitted a report to the IAA and SWC recommending that the site should not be released for construction, stating that in the portions excavated "A total of 250 skeletons were excavated, some of them from secondary burials, and another 200 graves were exposed but not excavated. On the basis of the above, I estimated that there are at least about 2000 graves on the site," in at least four layers.<sup>51</sup> The remains found dated back to the 12th century or earlier, and were all buried according to Muslim burial rites, while the bottom layer excavated dated to the 11th century.<sup>52</sup> He further reported that the excavation was completed in only 10% of the entire project site, while in the remaining 90% of the site, "excavation was either only partial or preliminary."<sup>53</sup> It was reported that remains were mishandled and damaged in the process of this excavation and that at least one skull was smashed.<sup>54</sup>

As the IAA's Chief Excavator, Suleimani, attested subsequently, the IAA excavations were marred by intense pressure exerted on the IAA by representatives of the Museum project and by various Israeli politicians sympathetic to the project to conclude the excavations hastily, and to approve the continuation of the project in order to enable construction of the Museum to begin.<sup>55</sup> The IAA, in turn, not only put pressure on Suleimani to stop the digging, but he was also asked if he would alter his report, which found that the site was an antiquity and that construction should not be allowed without a full investigation of all human remains on the site and appropriate documentation.<sup>56</sup> Indeed, Suleimani stated that representatives of the SWC "would come to the site on a daily basis, pressing for the excavations to progress quickly, to prevent the Muslims from halting the project," and that "In the course of the excavations, threats began coming in from the entrepreneurs...[who] were threatening that if the excavation was held up they would sue the Antiquities Authority, and therefore the pace must be quickened."<sup>57</sup>

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<sup>51</sup> See Suleimani Affidavit, supra note 47, at para. 17.9, Appendix II.

<sup>52</sup> Id. at paras. 26,28 ; See also Meron Rapoport, Zero Tolerance, MA'ARIV, Feb. 27,2009.

<sup>53</sup> Suleimani Affidavit, supra note 47, at para. 17.2-17.3, Appendix II.

<sup>54</sup> Jonathan Lis and Amiram Barkat, Treatment of skeletons found at museum building site raises storm, HAARETZ, 8/2/2006, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=680072>.

<sup>55</sup> Suleimani Affidavit, supra note 47, at paras. 10-14, Appendix II.

<sup>56</sup> Id. at para. 30.

<sup>57</sup> Id. at paras. 10, 12.

The submission of a petition to the High Court to halt the excavations and the construction of the Museum resulted in a temporary order to stop work and close off the site in 2006. Although excavations temporarily stopped when the High Court issued its order, desecration of the cemetery continued – graves were vandalized, reportedly by fundamentalist Jewish groups.<sup>58</sup>

After the Israeli High Court released its decision to allow the project to move forward in October, 2008, construction resumed on the Museum site, despite continued opposition to it and revelations that the IAA and the SWC were not forthright with the Court regarding the excavations completed and the large number of graves remaining on the site.<sup>59</sup> The IAA claims that human remains found during the latest work by agents of the SWC, under direction of the IAA, are being manually removed after documentation in order that they may be reburied in an alternate location.<sup>60</sup> The decision to remove and reinter Muslim remains, however, was taken without consultation with legitimate Muslim authorities, and in the face of severe opposition on the part of Palestinians, Muslims and others opposed to the project, including the Petitioners. It was reported that in one week of 2009 alone, 300 Muslim graves were disinterred during construction on the Museum site, and the remains were dumped into a mass grave.<sup>61</sup> Recent reports have mentioned that remains have been assembled around the perimeter of the construction site pending a decision by the relevant authorities on their possible re-interment elsewhere in Mamilla or at another site.<sup>62</sup> The great secrecy with which the SWC and the Israeli government have cloaked the project makes it difficult for the petitioners to determine the real extent of the desecration involved, and the whereabouts of all of the exhumed remains.<sup>63</sup>

Although Israel claims that preparation of the site for construction is complete, the work performed has not only left hundreds, if not thousands, of human remains and graves in disarray and unaccounted for, but there also remain thousands of graves beneath the construction site. The project site is an area of desecration, and allowing construction of the Museum above it will only exacerbate the damage to any remains still at the site, and to the sensitivities attached to this issue by the Petitioners and many other Palestinians, Muslims, Jews and others. Needless to say, Petitioners oppose any further disturbance of graves and remains

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<sup>58</sup> Makdisi, *supra* note 10, at 13.

<sup>59</sup> These revelations included the statements of Suleimani in an interview with an Israeli newspaper regarding the suppression on the part of the IAA of his findings from the excavation, as detailed *infra*, section II.B.2. See Rapoport, *Zero Tolerance*, *supra* note 52.

<sup>60</sup> Michael Green, *Underlying Issues*, JERUSALEM POST, March 7, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1236269363261&pagename=JPost/JPArticle/ShowFull>

<sup>61</sup> Palestinian News Network, *Israel municipality digs up 300 Muslim graves in Jerusalem this week for 'Museum of Tolerance'*, July 16, 2009, available at [http://english.pnn.ps/index.php?option=com\\_content&task=view&id=6176&Itemid=29](http://english.pnn.ps/index.php?option=com_content&task=view&id=6176&Itemid=29)

<sup>62</sup> Private communication from Gershon Baskin, Director, IPCRI, October 2009.

<sup>63</sup> Access to the site is closely guarded, with a high barrier erected around it and constant camera surveillance of the site. See photographs, Appendix VIII.D; Suleimani Affidavit, *supra* note 47, at para. 27 (describing how "the site was...surrounded by high fences, cameras were installed and guards were placed around the site, so that it looks more like a military camp, all with the aim of maintaining secrecy."), Appendix II.

in Mamilla, for archaeological or any other purposes, excepting action necessary to restore and preserve the cemetery.

## **2. Israel is Complicit in the Desecration Committed in Mamilla**

The Israeli state, its organs and agents, have been involved at all stages of this project. The cemetery was proposed to the SWC as a site for the Museum by the Jerusalem Municipality in 1993, despite its full knowledge that the site is part of the Mamilla cemetery.<sup>64</sup> Former Jerusalem mayors Teddy Kollek and Ehud Olmert were instrumental in encouraging the project and offering the cemetery as a site.<sup>65</sup> A company owned by the Jerusalem Municipality, Moriah Jerusalem Development Co., Ltd. was contracted by SWC to construct the museum and was the primary company tasked with the initial digging of the site when hundreds of remains were found.<sup>66</sup>

Most harmful has been the Israeli Antiquities Authority's (IAA's) role in approving the site for construction after beginning archeological excavations to determine the site's value as an antiquity, even though it had itself included Mamilla on its list of "Special Antiquities Sites" in Jerusalem, and determined it to be a site of especially high value with "historical, cultural and architectural importance," on which there should be no development, and which should be rehabilitated and maintained.<sup>67</sup> The excavations it conducted were tainted by severe pressure to discontinue the work, including from the backers of the Museum project, IAA officials, and Israeli politicians. The IAA's accession to this pressure is explained by the fact that the SWC was financing the archaeological excavation work, in violation of Israeli law.<sup>68</sup> As noted, the work was stopped in 2006 by a High Court order after a lawsuit was filed challenging the legality of the Museum project on the cemetery.

In the process of defending against this lawsuit, the IAA ultimately concealed the findings and recommendations of Gideon Suleimani, whom it had appointed as Chief Excavator of the IAA excavation, regarding the prevalence of graves at the site so as to ensure a favorable ruling from the Israeli High Court. Thus, rather than alerting the Court to Suleimani's recommendation that no construction should resume because the excavation was only partial and the site was replete with Muslim

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<sup>64</sup> The fact that previous construction on the site to build a parking lot resulted in the unearthing and desecration of hundreds of graves, to the protests of Muslims, surely did not escape the proponents of the museum project. See Meron Benvenisti, *The hypocrisy of tolerance*, HAARETZ, Sept. 2, 2006, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=680580>. That the site is part of the cemetery is also evident from Israeli maps showing the original boundaries of the cemetery, which includes the proposed Museum site. See Appendix VII.

<sup>65</sup> Netty C. Gross, *supra* note 26, at 22.

<sup>66</sup> See Benvenisti, *supra* note 64.

<sup>67</sup> 2009 High Court Petition, *supra* note 19, at para. 73.

<sup>68</sup> The Israeli High Court itself has ruled, in an unrelated decision, that the Israeli Antiquities Authority is obligated to finance excavations examining sites for the presence of antiquities. See *Estate of the Late Lilly Dankner, Deceased, et al. v. the Director of the Antiquities Authority et al.*, High Court of Justice File 4146/05, ILR 52(4) 774, 813–14. Antiquities Authority regulations also forbid the Authority to receive financing from entrepreneurs who are developing a site. See 2009 High Court Petition, *supra* note 19, at 30.

graves at least four layers deep and dating back to the 11th century, the IAA submitted false information to the Court that “almost the entire area of the excavation has been released for construction, because it contains no further scientific data,” and thus there was no need for further excavation.<sup>69</sup> Based on maps Suleimani attests contradict those that he had submitted illustrating the work done on the site, the IAA claimed that only a small portion of the Museum site contained the majority of the human remains found, and that the excavations were otherwise complete.<sup>70</sup> Dr. Raphael Greenberg, an Israeli archeologist based at Tel Aviv University who is knowledgeable about the excavations conducted by Suleimani, confirmed that “the maps the IAA presented to the court are ‘in opposition to the reality in the area,’ because they show that excavation is complete in areas where it has not even begun.”<sup>71</sup> The Court’s ruling reflects its reliance on this misleading information.<sup>72</sup>

In this manner, the very same Israeli Governmental authority whose purpose it is to protect historical antiquities sites, that is, the IAA, has acted consistently in this case to permit the continued destruction of one of Jerusalem’s oldest and most revered Muslim cemeteries, contrary to the opinions of its own professionals and to its previous designation of the site as a special antiquities site. Suleimani has thus declared that the IAA “under pressures on the part of the entrepreneurs and politicians, participated in the destruction of a valuable archeological site,” and that its conduct constitutes an “archeological crime.”<sup>73</sup> As he stated in an interview, “We’re talking about tens of thousands of skeletons under the ground there, and not just a few dozen.”<sup>74</sup>

### **3. The Project has Proceeded Despite Consistent Opposition**

Since the project was revealed, Palestinian, Israeli and other Muslim and Jewish religious leaders, scholars, individuals and organizations have been warning proponents of the project of the discord such a project would engender given the importance of the cemetery to Palestinians and Muslims, and noting that it contains graves of family members of

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<sup>69</sup> See Suleimani Affidavit, supra note 47, at para. 19, Appendix II (declaring that the IAA’s claim “is a factual and archaeological lie.”).

<sup>70</sup> Id., at paras. 22–25 (explaining in detail the “disturbing and profound differences” between Suleimani’s own map and that submitted to the High Court by the IAA).

<sup>71</sup> Meron Rapoport, IAA approves of building museum on ancient Muslim cemetery, HA’ARETZ, July 7, 2007, available at <http://www.haaretz.co.il/hasen/spages/880732.html> [hereinafter Rapoport, IAA approves building].

<sup>72</sup> See Al-Aqsa Assoc. judgment, supra note 31 (relying on the defendants’ assertion that only one area, constituting 12% of the site, was contentious because it contained the majority of the graves); Suleimani Affidavit, supra note 47, at para. 23 (noting that the High Court judgment “mainly relied” on the map submitted by the IAA), Appendix II. Although the Court’s most recent decision in December, 2009, which rejected a petition to void the IAA’s decisions based on the information revealed by Suleimani, stated that Suleimani’s report was submitted to the Court during the first petition, it was not submitted by the IAA itself but by the petitioners in that case. Moreover, the Court ignored the information therein and relied instead on the incorrect information about the excavation results that the IAA provided. See The Committee of the Families of the Dead Buried in the Maaman Allah (Mamilla) Cemetery and Others v. the (Israeli) Antiquities Authority and others, HCJ 3227/09, Dec. 23, 2009 [hereinafter Committee of the Families judgment]. See infra, fn. 112–115 and related discussion for more detail on the latest High Court decision.

<sup>73</sup> Suleimani Affidavit, supra note 47, at paras. 15, 31, Appendix II.

<sup>74</sup> Kamon Ben Shimon, Limits to Tolerance, THE JERUSALEM REPORT, July 20, 2009, at 14.

living Palestinians and those of important Muslim historical figures.<sup>75</sup> Many Jewish individuals and organizations have also argued that it presents a moral dilemma for Jews who believe in the sanctity of their own cemeteries, and have worked to halt the project.<sup>76</sup> Indeed, public revelations about the desecration of hundreds of Muslim remains resulted in widespread indignation on the part of Palestinians of all faiths, as well as Jews who oppose such desecration on moral and religious grounds, including the Petitioners. There have been several public demonstrations against the construction. Protests arose when it was discovered that human remains were being dug up and improperly disposed of.<sup>77</sup> Further protests took place against the High Court decision in 2008.<sup>78</sup>

Despite the public pressure, the SWC, with Israel's support, has refused to alter its plans for its "Center for Human Dignity – Museum of Tolerance." The arbitration set up by the High Court in 2006 to help resolve the dispute over the cemetery broke down after SWC insisted that it would not consider any other site for its museum plan.<sup>79</sup> Pressure from the Mayor of Jerusalem and various Israeli Knesset members to cease erection of the Museum on the cemetery have proven fruitless.<sup>80</sup>

### **III. ISRAEL'S PATTERN OF DISREGARD FOR MUSLIM RELIGIOUS SITES**

The past and current desecration of Mamilla cemetery by Israeli authorities is part of a much broader history of occupation, repression, and discrimination on the part of the State of Israel towards Palestinians, both Muslim and Christian, inside Israel and in the Palestinian territory occupied in 1967. The discrimination that Palestinians continue to face manifests itself in many forms, including religious, ethnic, racial and on the basis of nationality, all of specific concern in this case.

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<sup>75</sup> Id., at 14 (noting that "The project has been controversial since it was first proposed in 1993, long before the construction began.")

<sup>76</sup> The petitioners in the 2009 Petition to the High Court included organizations such as Rabbis for Human Rights, The Shalom Block, The Center for Jewish Pluralism, etc., and individuals such as Rabbi Michael Malchior, Rabbi Naftali Rotenberg, Uri Avneri, etc. See 2009 High Court Petition, supra note 19. Other Jewish and Israeli religious, political and intellectual figures who have publicly opposed the project on religious and moral grounds include, among many others: Rabbi Eric Yoffie, President of the Union for Reform Judaism, see Eric Yoffie, Don't Build Wiesenthal museum on disputed Jerusalem site, JTA, Feb. 2, 2009, available at <http://www.ipcri.org/files/reformresponse.html>; U.S.-based Jewish organizations such as the Progressive Faith Foundation, Jews on First, and Jewish Voices for Peace, represented by Rabbi Seven Jacobs, Rabbi Haim Beliak and Sydney Levy, respectively, see Gross, supra note 26 at 24; Rabbi David Schidl, see Nir Hasson, Jews and Muslims unite against Jerusalem Museum of Tolerance, HAARETZ, July 6, 2009, available at <http://www.haaretz.com/hasen/spages/1096949.html>; Dr. Rafi Greenberg, a prominent archeologist; Gershon Baskin, Co-CEO of the Israel/Palestine Center for Research and Information, who is behind the Public Committee Against the Construction of the Wiesenthal Center Museum of "Tolerance" Over the Muslim Cemetery in Mamilla; Daniel Siedeman, a lawyer and founder of Ir Amim; Knesset Speaker Reuven Rivlin, see Gershon Baskin, Encountering Peace: A city of tolerance, not a Museum of Tolerance, JERUSALEM POST, Nov. 4, 2008, available at <http://www.ipcri.org/files/cityoftolerance.html>; Jerusalem City Council member Meir Margalit; Former Deputy Mayor of Jerusalem Meron Benvenisti; Former Jerusalem City Councilwoman, Anat Hoffman. See Gross, supra note 26, at 23; Ben Shimon, supra note 74, at 14.

<sup>77</sup> See, e.g., Donald Macintyre, Israel plans to build 'Museum of Tolerance' on Muslim Graves, THE INDEPENDENT, Feb. 9, 2006; Lis and Barkat, supra note 54.

<sup>78</sup> See, e.g., Yova Stern, Arabs rally against construction of Jerusalem museum on Muslim cemetery, HA'ARETZ, 6/11/2008, available at <http://www.haaretz.com/hasen/spages/1035063.html>.

<sup>79</sup> See Gross, supra note 26, at 22.

<sup>80</sup> See infra, notes 112–114, and related discussion.

The Mamilla Cemetery is located in the western part of Jerusalem, which together with East Jerusalem and its environs, was declared to be an international corpus separatum under United Nations General Assembly Resolution 181 of 29 November, 1947. Resolution 181, which provided the international charter for the establishment of the state of Israel, endowed Jerusalem with a special international regime, and included provisions that protected the holy sites and religious landmarks of all religions. It specified that “existing rights in respect of Holy Places and religious buildings or sites shall not be denied or impaired,” and that “Holy Places and religious buildings or sites shall be preserved. No act shall be permitted which may in any way impair their sacred character.”<sup>81</sup>

However, Israel seized control of the western part of Jerusalem, including the area of the Mamilla cemetery, in 1948, and has administered it ever since, in contravention of United Nations resolutions on the subject.<sup>82</sup> As early as December 9, 1949, after the establishment of the State of Israel, the United Nations General Assembly, in its resolution 303(IV), restated its intention that: “Jerusalem should be placed under a permanent international regime, which should envisage appropriate guarantees for the protection of the Holy Places, both within and outside Jerusalem...” The General Assembly also reconfirmed specifically the provisions of General Assembly Resolution 181 (II) establishing a special international regime for Jerusalem, and noting that “the City of Jerusalem shall include the present municipality of Jerusalem plus the surrounding villages and towns.”<sup>83</sup>

Israel’s continued rule over all of Jerusalem flouts this internationally mandated arrangement. Most importantly for the purposes of this Petition, in spite of Israeli laws enacted since 1948 that have pledged to protect holy sites from desecration and assure freedom of access of different religious groups to their holy sites, Israel has failed to provide the protections for “religious buildings or sites” envisaged by UNGA Resolution 181 and other UN resolutions. Israel’s Protection of Holy Places Law of 1967, which applies to all of Jerusalem, states that: “The Holy Places shall be protected from desecration and any other violation and from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places.”<sup>84</sup>

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<sup>81</sup> United Nations General Assembly Resolution 181, Future Government of Palestine, A/Res/181(II)(A+B), Nov. 29, 1947, sec. III.C.13.a and III.C.13.c, respectively.

<sup>82</sup> Sovereignty over western Jerusalem remains an unresolved issue. While Israel controls Jerusalem and acts as a de facto sovereign over it, its sovereignty has not been formally recognized in any part of Jerusalem by the international community, as is evident from UNGA Resolutions 181 and 303, and subsequent United Nations resolutions. It is further indicated by the fact that the United States consulate in western Jerusalem falls under the jurisdiction of the consulate-general in East Jerusalem, rather than the jurisdiction of the U.S. embassy in Tel Aviv. See also *Veffer v. Canda* (Minister of Foreign Affairs), 2006 FC 540, May 1, 2006 (concluding that “Nothing has changed since 1949 in regard to any legal basis for a claim to Jerusalem by Israel... Jerusalem has not been recognized by the international community as being under Israel’s sovereignty...The fact that the eastern portion of Jerusalem is viewed as occupied territory has not altered the fact that the international community continues to regard sovereignty over the entire city of Jerusalem as unresolved.”).

<sup>83</sup> United Nations General Assembly Resolution 303(IV), Palestine: Question of an international regime for the Jerusalem area and the protection of the Holy Places A/Res/303(IV), Dec. 9, 1949, attached as Appendix IX.A.

<sup>84</sup> Protection of Holy Places Law, June 27, 1967, SH 499, 75.



Notwithstanding this, Israel has systematically neglected its duties with regard to the protection of non-Jewish religious sites in the Holy City of Jerusalem. This was recognized as early as 1980, when United Nations Security Council resolution 476 of June 30, 1980 deplored “the persistence of Israel, in changing the physical character, demographic composition, institutional structure and the status of the Holy City of Jerusalem” and reconfirmed:

that all legislative and administrative measures and actions taken by Israel, the occupying Power, which purport to alter the character and status of the Holy City of Jerusalem have no legal validity and constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.<sup>85</sup>

The Security Council also urgently called on “Israel, the occupying Power, to abide by this and previous Security Council resolutions and to desist forthwith from persisting in the policy and measures affecting the character and status of the Holy City of Jerusalem.”<sup>86</sup> More recently, in Resolution 1322 deploring the “provocation carried out at Al-Haram Al-Sharif in Jerusalem on 28 September 2000, and the subsequent violence there and at other Holy Places,” the Security Council reaffirmed “the need for full respect by all of the Holy Places of the City of Jerusalem, and condemned any behaviour to the contrary.”<sup>87</sup> In its resolutions of 1980 and 2000, the Security Council was referring to Israel’s failure to protect religious sites in the entirety of the Holy City of Jerusalem, as indicated by the fact that they were not limited to East Jerusalem. In this regard, the UN Human Rights Council in an October 21, 2009 resolution similarly recognized that Israel has human rights obligations in the entirety of the Holy City of Jerusalem, calling on the High Commissioner for Human Rights to report on implementation of these obligations “in and around East Jerusalem.”<sup>88</sup>

The failure of Israel to carry out its duty to protect non-Jewish religious sites has been highlighted previously by the Special Rapporteur on Freedom of Religion and Belief. In her 2009 Report, following a visit to Israel and the Occupied Palestinian Territory, the Special Rapporteur explicitly addressed Israel’s failure to protect non-Jewish Holy Sites. The report recognized Israeli laws that “aim to safeguard and preserve sacred places from desecration,” but noted that “all the 136 places which have been designated as holy sites until the end of 2007 are Jewish and the Government of Israel has so far only issued implementing regulations for

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<sup>85</sup> United Nations Security Council Resolution 476, S/Res/476 (1980), June 30, 1980 attached as Appendix IX.B.

<sup>86</sup> *Id.*

<sup>87</sup> United Nations Security Council Resolution 1322, S/RES/1322, October 7, 2000.

<sup>88</sup> Human Rights Council Resolution, The human rights situation in the Occupied Palestinian Territory, including East Jerusalem, A/HRC/S-12/1, Oct. 21, 2009 [hereinafter 2009 HRC Resolution].

Jewish holy sites.”<sup>89</sup> The United States State Department’s International Religious Freedom Report of 2009 similarly noted in this respect:

The 1967 Protection of Holy Sites Law applies to holy sites of all religious groups within the country and in all of Jerusalem, but the Government implements regulations only for Jewish sites. Non-Jewish holy sites do not enjoy legal protection under it because the Government does not recognize them as official holy sites. At the end of 2008, there were 137 designated holy sites, all of which were Jewish. Furthermore, the Government has drafted regulations to identify, protect, and fund only Jewish holy sites. While well-known sites have de facto protection as a result of their international importance, many Muslim and Christian sites are neglected, inaccessible, or threatened by property developers and municipalities.<sup>90</sup>

One illustration of this deliberate discrimination is the marked inequality in the treatment of Jewish remains found on construction sites versus those of non-Jews. Jewish religious authorities are called upon and construction can be stopped immediately when it is believed that there are Jewish remains, in order that they may be accorded proper religious treatment.<sup>91</sup> In contrast, as in the case of the current development on Mamilla, Muslim religious authorities are not consulted to ensure that the remains and the cemetery be dealt with according to Islamic law.<sup>92</sup> As Gideon Suleimani, the IAA’s Chief Excavator of the Museum site on Mamilla noted, “The Muslim dead have no one to defend them...[A Ministry of Religion official] came to the site and told me, ‘If one Jewish skeleton were found, I would stop the excavations immediately.’ But no Jewish remains were found and [he] was not concerned.”<sup>93</sup> This attitude is confirmed by a recent study on the treatment of non-Jewish religious sites in Israel, which documents several cases in which Israeli authorities continued construction works despite the discovery of Muslim graves during construction projects.<sup>94</sup>

For another illustration of this discrimination, we need only contrast the Israeli decision to build a “Center for Human Dignity – Museum of Tolerance” atop the most historically important Muslim cemetery in

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<sup>89</sup> Special Rapporteur on freedom of religion and belief, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, Addendum: Mission to Israel and the Occupied Palestinian, para. 37, U.N. Doc. A/HRC/10/8/Add. 2 (Jan. 12, 2009) [hereinafter Report of SR on freedom of religion and belief].

<sup>90</sup> US State Department, Bureau of Democracy, Human Rights and Labor, International Religious Freedom Report, 2009: Israel and the occupied territories, October 26, 2009.

<sup>91</sup> See Rapoport, Zero Tolerance, supra note 52; Suleimani Affidavit, supra note 47, at para. 26, Appendix II (noting that “when the skeletons found are suspected to be Jewish, it is mandatory to notify the Ministry of Religions, and its representatives may discontinue the excavations.”).

<sup>92</sup> See Brownstein and Mizroch, supra note 44 (noting the Grand Mufti of Jerusalem, the West Bank and Gaza Strip, Ikrima Sabri’s complaint that “Muslim religious authorities were not consulted about digging at the site.”). See also Lis and Barkat, supra note 54 (noting that Muslim religious institutions were not involved in the excavation of Muslim graves at Mamilla, and that IAA procedures require coordination with the Religious Affairs Ministry, which serves the interests of Orthodox Jewish Israelis exclusively).

<sup>93</sup> See Rapoport, Zero Tolerance, supra note 52.

<sup>94</sup> See Arab Association for Human Rights, Sanctity Denied: The destruction and abuse of Muslim and Christian Holy Places in Israel, April 27, 2004, available at <http://www.arabhra.org/Hra/SecondaryArticles/SecondaryArticlePage.aspx?SecondaryArticle=1354> [hereinafter Sanctity Denied].

Jerusalem, Mamilla, with that of the decision to designate a historical Jewish cemetery located on the Mount of Olives as a Jewish heritage site.<sup>95</sup> Repeated efforts by Muslim and other Palestinian groups in Israel to preserve their graveyards and other religious sites from destruction and vandalism have consistently failed to stop the destruction that Israel justifies in terms of “development pressures and public needs.”<sup>96</sup> It is within this context, therefore, that pre-1948 Muslim cemeteries all over Israel have suffered similar fates, and have been, according to the former Deputy Mayor of Jerusalem, Meron Benvenisti:

turned into garbage dumps, parking lots, roads and construction sites...Open burial sites are scattered throughout the country, human bones are strewn about, and tombstones are shattered, covered with garbage...The Muslim cemeteries' condition is so outrageous that if it existed in another civilized state it would raise a public storm.<sup>97</sup>

The priority that Israel places on promoting only the Jewish narrative of the history and culture of British Mandate Palestine, as well as on the development of land for the exclusive benefit of Jewish Israelis, has resulted in the destruction and neglect of many sites important to Muslims and Christians in Palestine and around the world, including religious, historical and cultural sites, because of a failure to sufficiently protect and preserve them by the State.<sup>98</sup> The continuous threat, since the occupation of East Jerusalem in 1967, to the Al-Aqsa mosque, the third holiest site for Muslims, is a well-documented example which continues to receive international attention. The outer enclosure wall of the mosque complex, the Holy Sanctuary (Al-Haram al-Sharif), is built on the lower courses of the enclosure wall of the Herodian temple, which was located on the same site until its destruction by the Romans in 70 AD. Since 1967, Israel has been digging under and around the complex, allegedly in search of evidence of ancient Jewish historical sites. Its continued excavations and tunneling are believed by the Muslim community to threaten the collapse of parts of the mosque complex itself, and have already led to the collapse of houses and other buildings in the Muslim Quarter of Jerusalem's Old City. Despite widespread condemnation of these excavations, about which Israeli authorities disclose little, Israel has not heeded the warnings of the international community and the protests of Palestinians and Muslims

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<sup>95</sup> Benvenisti, *supra* note 64.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* See also Sanctity Denied, *supra* note 94 (describing the fate of many non-Jewish cemeteries in Israel).

<sup>98</sup> See Dan Lieberman, Why Jerusalem? Israel's Hidden Agenda, 956 AL-AHRAM WEEKLY ON-LINE, July 16-22, 2009, available at <http://weekly.ahram.org.eg/2009/956/special.htm>. The systematic destruction of over 400 Palestinian villages during and after the war of 1948, including in many cases the religious sites within them, such as cemeteries, mosques and churches, was only the beginning. See generally, Walid Khalidi, ed., ALL THAT REMAINS: THE PALESTINIAN VILLAGES OCCUPIED AND DEPOPULATED BY ISRAEL IN 1948, Institute for Palestine Studies, 1992. See also Destruction and Desecration of Christian Holy Places after 1948, available at [http://www.jerusalemities.org/crimes/crimes\\_against\\_christianity/27.htm](http://www.jerusalemities.org/crimes/crimes_against_christianity/27.htm), (documenting the destruction of Christian holy sites after 1948).

all over the world.<sup>99</sup> Recent excavations in areas of occupied East Jerusalem further illustrate this point: While the Israeli authorities and the IAA are conducting archeological excavations looking for evidence of an ancient Jewish presence in the area, living Palestinians are being evicted from their homes, which are then demolished, under the pretext that they were built illegally.<sup>100</sup>

The land and property ownership laws of Israel are especially egregious in their manifest discrimination against Palestinian citizens of Israel. The Absentee Property Law of 1950 expropriated the land of Palestinians deemed “absent” from Israel after hostilities ceased in 1948 and transferred it to the Custodian of Absentee Property with the aim of making land and property available for settling Jewish immigrants to the new state. This included Islamic endowment (waqf) properties, such as religious institutions and mosques, and holy sites and cemeteries like Mamilla. State lands controlled by national institutions such as the Jewish National Fund, which itself owns about 13 percent of the land in Israel, as well as the Israel Lands Authority, are subject to openly discriminatory criteria that bar non-Jews from owning, leasing or otherwise accessing these lands.<sup>101</sup> Most of these lands were originally expropriated in 1948 without compensation from their Palestinian owners. The fact that Palestinians have neither been compensated nor allowed to regain their homes and property in Israel, in violation of international law and United Nations resolutions on the matter, while the property of Palestinians continues to be seized today, both in Israel and in the Occupied Palestinian Territory, is evidence of Israel’s discriminatory policies regarding land rights.<sup>102</sup>

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<sup>99</sup> See, e.g., 2009 HRC Resolution, *supra* note 88 (condemning Israel’s digging “in and around Al-Aqsa mosque and its vicinity” and demanding that Israel cease all excavation works there and “refrain from any acts or operations that may endanger the structure or foundations or change the nature of holy sites both Christian and Islamic.”); Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination – Israel, CERD/C/ISR/CO/13, June 14, 2007, at para. 36 (expressing concern that excavations under al-Aqsa were endangering the mosque)[hereinafter 2007 CERD Report]; Report of the UNESCO technical mission to the Old City of Jerusalem, 176 EX/Special Plenary Meeting/ INF.1, April 17, 2007, paras. 49 and 51 (recommending that Israel halt its excavations under the mosque).

<sup>100</sup> See Ilene Prusher, *Why 88 Arab homes received eviction notices*, THE CHRISTIAN SCIENCE MONITOR, Feb. 26, 2009, available at <http://www.csmonitor.com/World/Middle-East/2009/0226/p04s01-wome.html> (noting the plans to demolish Palestinian homes “to make way for a new archaeological park.”). The Human Rights Council recognizes that all of Israel’s actions in Jerusalem are part of its wider efforts to change the demography of Jerusalem, in contravention of international law, in order that it become a permanent part of Israel. See 2009 HRC Resolution, *supra* note 88 (condemning, at once, “the confiscation of lands and properties, the demolishing of houses and private properties, the construction and expansion of settlements, the continuous construction of the separation Wall, changing the demographic and geographic character of East Jerusalem...”).

<sup>101</sup> See, e.g., Dan Leon, *The Jewish National Fund: How the Land Was ‘Redeemed’*, 12.4 & 13.1 PALESTINE-ISRAEL JOURNAL OF POLITICS, ECONOMICS AND CULTURE, 2005/06, available at <http://www.pij.org/details.php?id=410>.

<sup>102</sup> See United Nations General Assembly Resolution 194(III), Palestine – Progress Report of the United Nations Mediator, A/Res/194(III), Dec. 11, 1948, at para. 11 (spelling out the right of Palestinians to return to their properties or receive compensation). In Israel, land is continually seized from Palestinians on the basis of discriminatory building and planning laws that result in the restriction of development in Palestinian areas and proceed to penalize Palestinians with evictions and home demolitions upon defiance of such laws. See Centre on Housing Rights and Evictions, Report Prepared for Office of High Commissioner of Human Rights Concerning Israel, July, 2008, available at <http://www.cohre.org/store/attachments/COHRE%20UPR%20Israel%20and%20OPT%20FINAL.pdf>. Continuing home demolitions and evictions of Palestinians in East Jerusalem and their replacement by Israeli settlers, on the basis of dubious purchase or prior ownership claims, in violation of international law are central to Israel’s efforts to keep control of all of Jerusalem as its “undivided capital.” See, e.g., Palestinians evicted in Jerusalem, BBC NEWS, Aug. 2, 2009, available at (noting that “Jewish settlers moved into the houses [from which nine Palestinian families were evicted] almost immediately,” linking the issue to Israel’s claim of sovereignty over all of Jerusalem, and noting international condemnation of the actions).

This discrimination against non-Jewish citizens of Israel and Palestinians in Jerusalem has extended to many other facets of life. Given its self-identification as a “Jewish state,” the non-Jewish population of Israel, namely Christian and Muslim Palestinian Arabs, who currently make up approximately 18 percent of the Israeli population, are citizens whose non-Jewishness by definition precludes their enjoyment of the same rights before the State.<sup>103</sup> Some aspects of the widespread discrimination against non-Jewish communities and citizens in Israel, including the availability of resources for education, housing, urban development, access to jobs in key sectors of the economy and the State, and land ownership, have been repeatedly cited by the UN Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights, among other international bodies.<sup>104</sup>

#### **IV. EXHAUSTION OF REMEDIES**

Individuals and groups affected by the construction of the “Museum of Tolerance” over a part of the cemetery, in addition to the present Petitioners, have undertaken numerous efforts to halt the construction and protect the cemetery from further desecration. There have been several petitions filed in Israeli courts, public demonstrations to the Israeli authorities, and informal attempts to halt construction of the Museum.

Despite concentrated efforts to address this issue in the Israeli courts, Palestinian and Israeli petitioners have failed to arrest the SWC Museum development plan. A successful petition to halt construction adjudged in the Muslim Shari’a Court in Israel proved fruitless when the High Court ruled that the Shari’a court had no jurisdiction over the matter.<sup>105</sup>

The Israeli High Court, the highest court in Israel whose decisions are final and not subject to appeal, considered a petition to halt construction in 2006. This resulted in a temporary order to cease construction while the case was being heard. The court’s decision in October of 2008 allowed construction to resume immediately, on condition that the human remains exhumed either be reburied in an alternative location, or that the Museum be built on a floating floor so as to avoid contact with the graves.<sup>106</sup> The Court’s reasoning was that the site’s importance for urban development purposes outweighed its religious, historical and cultural value to Muslims

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<sup>103</sup> UN Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, UN Doc. E/C.12/1/Add.90 (2003), at para. 16 (noting the “excessive emphasis upon the State as a ‘Jewish State’ encourages discrimination and accords a second-class status to its non-Jewish citizens.”) [hereinafter 2003 ECOSOC Observations].

<sup>104</sup> See, e.g., 2007 CERD Report, *supra* note 99; 2003 ECOSOC Observations, *supra* note 103, at para. 16 (noting that discrimination “is apparent in the continuing lower standard of living of Israeli Arabs as a result, inter alia, of higher unemployment rates, restricted access to and participation in trade unions, lack of access to housing, water, electricity, and health care and a lower level of education.”).

<sup>105</sup> See High Court of Justice File 1331/06 and High Court of Justice File 1771/06.

<sup>106</sup> See *Al-Aqsa Assoc.* judgment, *supra* note 31. It is presently unclear whether one of these alternatives was chosen. In either case, there was no coordination with Muslim authorities regarding the treatment of the remains.

and Palestinians, and that opposition to the development was implausible because no protest was raised when the state had previously built on the cemetery.<sup>107</sup> This decision, however, was based on erroneous beliefs about the history of protests against previous incursions into the cemetery, as is evident from the discussion above. Moreover, the Court relied on misleading information provided by the Israeli Antiquities Authority (IAA). In particular, the IAA reported to the High Court, in complete contradiction of its Chief Excavator's report, that it was releasing the site for construction because the excavations were completed on the majority of the site, and there were no further archeological findings to be made.<sup>108</sup>

A subsequent petition to the High Court in September, 2009 seeking nullification of the IAA decision to allow construction on the site was based on newly acquired evidence about the IAA's earlier egregious misrepresentations to the High Court. Specifically, the petition alleged that the IAA suppressed the report of its Chief Excavator, Gideon Suleimani, who was in charge of inspecting and excavating the site. Instead, the IAA submitted a map showing that excavations were nearly complete, and failed to inform the Court of Suleimani's conclusions that construction not be allowed because the site was replete with several layers of Muslim graves dating back 1000 years, and excavations were only complete on 10% of the site.<sup>109</sup> Another respected Israeli archeologist familiar with the details of the case, Raphael Greenberg, confirmed that the IAA's submission to the Court contained "statements that...are contrary to reality on the Site and contradict customary scientific criteria."<sup>110</sup> The IAA's decision to release the site for construction also did not follow the proper procedures, according to the petition.<sup>111</sup>

The High Court refused this petition in December 2009 on largely procedural grounds. Despite the wealth of new evidence submitted regarding the severity of the desecration being committed on the cemetery and the apparent deception committed by the IAA and the SWC in its dealings with the Court, the Court concluded that there was nothing in the second petition that was novel, and that it therefore could not reconsider its previous ruling.<sup>112</sup> While stating that Suleimani's report to the IAA had been submitted to the Court during hearings on the previous petition, the Court did not address, as it had failed to do in its first judgment, the significant contradictions between Suleimani's report and the information provided by the IAA regarding the progress and results of the excavations on the site.<sup>113</sup> Rather, it reiterated the IAA's version of the results, which

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<sup>107</sup> *Id.*

<sup>108</sup> See Section II.B.2 above.

<sup>109</sup> Suleimani Affidavit, *supra* note 47, Appendix II.

<sup>110</sup> See 2009 High Court Petition, *supra* note 19, at paras. 88–91. See also Rapoport, IAA approves building, *supra* note 71.

<sup>111</sup> 2009 High Court Petition, *supra* note 19, at paras. 78–105 (detailing IAA procedures that were not followed in this case).

<sup>112</sup> Committee of the Families judgment, *supra* note 72.

<sup>113</sup> *Id.* The Court also did not note that Suleimani's report was not submitted by the IAA itself, but rather by the petitioners in the Al-Aqsa Association case, a fact which indicates that the IAA attempted to conceal not only Suleimani's recommendations that construction should not resume, but also his findings that the site was replete with Muslim graves dating as far back as the 11th century.

its Chief Excavator Suleimani attested was “a factual and archaeological lie.”<sup>114</sup> This showed a puzzling disregard of the facts that should have been central to the Court’s decision in both judgments, namely, that the Museum’s construction was taking place on an ancient cemetery site replete with Muslim graves and human remains, which were being desecrated in the process. The judgment further emphasized that there was no remedy for the petitioners since the ground work on the site was already completed.<sup>115</sup>

This ruling, together with the Court’s 2008 ruling, clearly illustrates the Court’s bias in favor of allowing the SWC “Center for Human Dignity – Museum of Tolerance” to be constructed. Even with the knowledge that the Israeli government and the SWC allowed hundreds of human remains to be unearthed and removed to unknown locations without consent from or coordination with Muslim religious authorities, the Court was moved neither by the severe desecration of human remains on the project site, nor by the problematic role of the IAA and the SWC in concealing the fact that the site remained replete with graves and human remains and other valuable archaeological artifacts.

Furthermore, the Court’s conclusion that the desecration is a fait accompli fails to consider the interests of individuals such as the present Petitioners in ensuring that the desecrated remains be recovered and properly reburied in accordance with Muslim rites, and that the graves and remains that are still beneath the Museum site are left in peace and not further disturbed, as intended by those who buried them. As this case demonstrates, the High Court and the lower Israeli courts, over their six decades of existence, have repeatedly upheld the primacy of Jewish interests in the Israeli State, without equal or balanced consideration for the interests of Palestinians, whether Israeli citizens or stateless persons, and their rights.<sup>116</sup> The discriminatory practices and policies of the Israeli state have thus often been validated and defended by the Israeli judiciary.

Seeking legal remedies in Israel has been futile, as there is no adequate or available judicial remedy there to protect the cemetery from further desecration and destruction. Petitioners have therefore satisfied any exhaustion requirement. This complaint, moreover, seeks to ensure that the Israeli government not only ceases construction of the SWC Museum over a portion of the cemetery, but also that any further “development” of any part of the cemetery is prevented by declaring the entire site as an antiquity to be preserved and protected. Allowing the construction of a

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<sup>114</sup> *Id.*; See Suleimani Affidavit, supra note 47, at para. 19, Appendix II

<sup>115</sup> *Id.*

<sup>116</sup> This is evident from important High Court decisions affecting Palestinians, both citizens of Israel and in the Occupied Palestinian Territories, including its decision allowing construction of the same Wall which the ICJ deemed to be in violation of international law. See *Beit Sourik Village Council v. The Government of Israel* [2005] IsrSC 58(5) 807, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (9 July). See also, e.g., *Adalah Legal Center for Arab Minority Rights in Israel and others v. Minister of Interior and others*, HCJ 7052/03, May 14, 2006 (upholding Israeli law banning Israelis and their Palestinian spouses from the Occupied Palestinian Territories from living together).

Museum atop the cemetery will undoubtedly lead to the approval of other projects, and the gradual encroachment onto the cemetery will continue to the point that no trace of it is left. Israeli courts will not consider these larger issues.

Non-legal efforts to convince the SWC to abandon the project, undertaken by individuals and groups other than the current petitioners, have likewise proven unsuccessful. The current Mayor of Jerusalem, Nir Barkat, criticized the Museum's location, and attempted to convince the SWC to abandon the project on the cemetery site, even offering alternative locations for the Museum.<sup>117</sup> A hearing was held in the Israeli Knesset (Parliament) in February, 2006, during which representatives of the Muslim community expressed their distress at the project, and some Knesset members deplored the plan to build the Museum on a portion of the cemetery.<sup>118</sup> The Israeli Speaker of the Knesset's appeal to move the Museum to another site, onto land offered by the Jerusalem Municipality, went unheeded.<sup>119</sup> Popular petitions and other communications have also been sent to the SWC, showing widespread opprobrium for its insistence on continuing construction on the cemetery despite the opposition it has faced.<sup>120</sup> Numerous articles have been published in the media and in academic journals about the Museum project.<sup>121</sup>

Representatives of the SWC have attempted to defend their position and attack opposition to it as merely political and opportunistic, with clear disdain for the feelings that desecration of consecrated cemeteries engenders.<sup>122</sup> The protracted legal battles and the adverse publicity surrounding the issue have thus clearly failed to sway either the backers of the project or Israeli authorities, who continue to defend the use of the cemetery site for the Museum. The IAA continues to deny the fact that it omitted the considered opinion of its Chief Archeologist that construction should not resume, and to defend the construction atop the hundreds of Muslim graves in the cemetery.<sup>123</sup>

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<sup>117</sup> See 2009 High Court Petition, *supra* note 19, at paras. 191–92 (citing an article in Israeli newspaper *Yedioth Jerusalem*). See also, Green, *supra* note 60 (noting that Barkat was critical of the location of the Museum before he became Mayor, and has attempted to communicate with the SWC about “the entire meaning of the project.”); Central Conference of American Rabbis (CCAR) Resolution, Reform Rabbinate Opposes Removal of Ancient Muslim Cemetery to Make Way for Jerusalem Museum of Tolerance, Feb. 25, 2009 (commending Municipality for suggesting other locations for the museum), attached as Appendix VI.

<sup>118</sup> Baskin, *supra* note 76 (noting that a Knesset hearing resulted in the Knesset Speaker Reuven Rivlin appealing to the SWC to move the Museum to a different location).

<sup>119</sup> *Id.*

<sup>120</sup> See Petition by the Council on American Islamic Relations, *Urge Israel to Halt Construction of Museum on Muslim Cemetery*, available at <http://www.gopetition.com/online/23494.html>; Americans for Peace Now wrote a letter to the SWC with Israeli and Jewish public figures to urge it to change the location of the Museum, and organized a letter writing campaign for the public to express similar sentiments. See Action Alert: Museum of Tolerance: Respect Muslim Cemetery in Jerusalem, available at <http://peaceNOW.org/entries/archive5685>.

<sup>121</sup> Many of these appear as references in this Petition.

<sup>122</sup> See, e.g., Yaakov Lappin, Wiesenthal dean rejects museum protests as extremist agitation, *JERUSALEM POST*, Nov. 7, 2008, available at <http://www.jpost.com/servlet/Satellite?cid=1225910055540&pagename=JPost/JPArticle/ShowFull>

<sup>123</sup> See, e.g., Macintyre, *supra* note 77 (quoting IAA spokeswoman defending construction over cemeteries).



## V. ANALYSIS OF INTERNATIONAL LAW VIOLATIONS

### A. Right to Protection of Cultural Heritage

Preserving the cultural heritage of a people has been recognized as an important international priority, and has been the subject of numerous international instruments. The imperative to protect cultural property is a principle of both international human rights law and international humanitarian law, and the principle has attained the status of customary international law in both sets of laws. In both times of peace and during armed conflicts, therefore, states are obliged to take measures to protect cultural property located within their territory.

Cultural heritage encompasses “areas including archeological sites which are of outstanding universal value from the aesthetic, ethnological or anthropological point of view.”<sup>124</sup> As defined by UNESCO, “Outstanding universal value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity.”<sup>125</sup> The Mamilla cemetery in Jerusalem qualifies as a cultural heritage site, given its historical, cultural and religious significance not only to Palestinians, but to Muslims and people of all faiths, worldwide.

Several international human rights instruments incorporate the right to protection of one’s cultural heritage. The right to protection of cultural heritage is embodied in the more general individual rights enumerated in the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR), including the right to religion, culture, and family, as discussed in detail below. In addition, several instruments deal specifically with cultural heritage. The United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention concerning the Protection of the World Cultural and Natural Heritage, to which Israel is a party, states that “the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage...and situated on its territory, belongs primarily to that State.”<sup>126</sup> The Convention further emphasizes “that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.”<sup>127</sup> Moreover, it is the duty of States Parties to “set up...services for the protection, conservation and presentation of the cultural and natural heritage” and “to take the appropriate...measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.”<sup>128</sup>

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<sup>124</sup> UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, UNESCO Doc. 17/C106, (Nov. 16, 1972) Art. 1; Israel acceded Oct. 6, 1999 [hereinafter UNESCO Convention].

<sup>125</sup> UNESCO, Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, Operational Guidelines for the Implementation of the World Heritage Convention, Jan. 2008, para. 49, available at <http://whc.unesco.org/archive/opguide08-en.pdf>.

<sup>126</sup> UNESCO Convention, supra note 124, at Art. 4.

<sup>127</sup> Id., Art. 6(1)

<sup>128</sup> Id., Art. 5(2)(4).

A number of UNESCO Recommendations and Declarations also address the importance of safeguarding cultural heritage, and preventing its destruction. The 2003 Declaration concerning the Intentional Destruction of Cultural Heritage defines intentional destruction as “an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience...”<sup>129</sup> It then asserts that, in both peacetime and during armed conflict, “States should take all appropriate measures to conduct [activities] in such a manner as to protect cultural heritage,” while placing responsibility on states for intentional destruction that the state itself committed or failed to prevent.<sup>130</sup> The 1976 UNESCO Recommendation concerning the Safeguarding and Contemporary Role of Historical Areas includes important language recognizing that “this living evidence of days gone by is of vital importance for humanity and for nations who find in it both the expression of their way of life and one of the corner-stones of their identity.”<sup>131</sup> It goes on to state that “Historic areas and their surroundings should be actively protected, against damage of all kinds, particularly that resulting from unsuitable use, unnecessary additions and misguided or insensitive changes such as will impair their authenticity...”<sup>132</sup>

The universal right to protection of cultural heritage is further buttressed by the extensive provisions provided in international humanitarian law, which include obligations to protect and prevent the destruction of cultural property, both during peacetime and during armed conflict,<sup>133</sup> and to prohibit attacks against cultural property, including places of worship and historic monuments such as cemeteries.<sup>134</sup> Many of these principles relating to the protection of cultural property have attained the status of customary

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<sup>129</sup> UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, Oct. 17, 2003, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=17718&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>130</sup> *Id.* at secs. IV–VI.

<sup>131</sup> UNESCO Recommendation concerning the Safeguarding and Contemporary Role of Historical Areas, Nov. 26, 1976, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13133&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13133&URL_DO=DO_TOPIC&URL_SECTION=201.html). The Recommendation defines historic areas as follows: “ Historic and architectural... areas’ shall be taken to mean any groups of buildings, structures and open spaces including archaeological and palaeontological sites, constituting human settlements in an urban or rural environment, the cohesion and value of which, from the archaeological, architectural, prehistoric, historic, aesthetic or sociocultural point of view are recognized.” *Id.* at para. I(1)(a)

<sup>132</sup> *Id.* at para. 4.

<sup>133</sup> The Hague Convention, for one, obligates state parties to “undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict...” Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, Art. 3, Opened for signature 14 May, 1954; Israel signed 14 May, 1954; entered into force 7 Aug. 1956 [emphasis added].

<sup>134</sup> UNESCO’s Basic Rules on Cultural Property include “Rule 7: Do not damage the cemeteries of other ethnic groups; remember that this may inspire them to do the same to your own cemeteries.” See UNESCO, Cultural Property – Basic Rules, CLT/CH/01/7.1/INF1, 2001, available at <http://unesdoc.unesco.org/images/0015/001579/157916mb.pdf>

international law, to which all states are bound.<sup>135</sup> The requirement for protection of religious sites is explicit both in international human rights law and in international humanitarian law, and is especially important when the rights of a vulnerable religious, cultural and ethnic minority are involved, as is the case with the Muslim minority in Israel.

The status of Jerusalem, as the birthplace of the world's monotheistic religions and the repository of millennia of history, makes Israel's duty to protect and prevent the destruction of cultural heritage, including religious and historical sites such as cemeteries, an especially important one. UNESCO has consistently recognized Jerusalem in particular as a city immensely rich with the cultural heritage of Jews, Christians and Muslims alike. It has noted that the precarious and uncertain current status of Jerusalem endangers the cultural heritage embodied therein, and has adopted numerous resolutions "to ensure the safeguarding of all the spiritual, cultural, historical and other values of the Holy City."<sup>136</sup> In response to communications by representatives of Palestinians in 1986 regarding construction taking place on Mamilla cemetery, UNESCO adopted a resolution deploring actions in Jerusalem that "have imperiled important historical monuments which embody the cultural identity of the indigenous population."<sup>137</sup>

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<sup>135</sup> This fact was noted by the International Tribunal for the former Yugoslavia, and recognized by the International Committee of the Red Cross. See, Prosecutor v. Pavle Strugar (Trial Judgment), IT-01-42-T, para. 229 and related footnotes, International Tribunal for the former Yugoslavia (ICTY), Jan. 31, 2005, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=48ad42092>; Jean-Marle Henckaerts, Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict, INTERNATIONAL REVIEW OF THE RED CROSS, vol. 87, no. 857, March, 2005, at 201-202, available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0860/\\$File/ICRC\\_002\\_0860.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0860/$File/ICRC_002_0860.PDF). The ICRC's compilation of customary international humanitarian law rules includes rules 39 and 40, which state:

Rule 39. The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity.

Rule 40. Each party to the conflict must protect cultural property:

A. All seizure or destruction or willful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.

B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.

These rules are partially derived from the Additional Protocols to the Geneva Conventions, many provisions of which have attained the status of customary law. Additional Protocol I states:

Art 53. Protection of cultural objects and of places of worship:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

(a) to commit 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;

(b) to use such objects in support of the military effort;

(c) to make such objects the object of reprisals."

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. (Israel not a signatory)

Additional Protocol II to the Geneva Conventions states that

"it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples..."

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 16. (Israel not a signatory)

<sup>136</sup> See 1986 UNESCO Report, supra note 23, at Annex II. See also UNESCO, Jerusalem and the implementation of 23/C/Resolution 11.3, Report by the Director General, UNESCO 24C/15, 127 EX/12 Rev., Oct. 15, 1987.

<sup>137</sup> 1986 UNESCO Report, supra note 23, at Annex II.

It is apparent that cemeteries are sites which are recognized as part of a group's cultural heritage. In reference to Israel's treatment of religious sites important to non-Jews, the Special Rapporteur on Religion and Belief emphasized that "religious sites and cemeteries have more than a material significance for the religious community attached to them."<sup>138</sup> The United Nations General Assembly has urged all states to promote "a culture of tolerance and respect for...religious sites, which represent an important aspect of the collective heritage of humankind," and "to ensure that religious sites are fully respected and protected."<sup>139</sup> Israel has been repeatedly criticized for failing to adequately protect the cultural heritage of religious groups other than Jews, and has, indeed, contributed to the intentional destruction of such cultural heritage.

By contributing to the desecration and destruction of the Mamilla cemetery, which contains thousands of historically important graves, monuments, and other artifacts attesting to the rich history of Muslims in Jerusalem, as well as Christians before them, Israel has abandoned its duty to protect and preserve the cultural heritage of both the Muslim and Christian religious communities under its control. Its actions in the cemetery represent the antithesis of its duties to protect and conserve cultural heritage sites. Moreover, its actions violate the rights not only of individuals who have relatives buried there, such as the present Individual Petitioners, but also of the entire community of Muslims to whom the cemetery is of religious and historical significance, and the world community, in whose interest it is to protect "the collective heritage of humankind."

## **B. Right to Manifest Beliefs**

The right to freedom of religion and the right to manifest one's beliefs are enshrined in the Universal Declaration of Human Rights (UDHR), the principles of which are considered customary international law, as well as in the International Covenant on Civil and Political Rights (ICCPR), to which Israel is a state party.<sup>140</sup> A group's beliefs regarding the sanctity of its

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<sup>138</sup> Report of SR on freedom of religion and belief, supra note 89, at para. 39 [emphasis added].

<sup>139</sup> General Assembly Resolution 55/254, Protection of Religious Sites, A/Res/55/254, May 31, 2001.

<sup>140</sup> Universal Declaration of Human Rights, G.A. res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

Article 18: Everyone has the right to freedom of thought, conscience and religion; this rights includes freedom... to manifest his religion or belief in teaching, practice, worship and observance.

International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966), entered into force Mar. 23, 1976; ratified by Israel Oct. 3, 1991 [hereinafter ICCPR]

Art. 18 (1) : Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom...either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

These provisions were expounded upon by the Human Rights Committee in General Comment No. 22:

Para. 4: "The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae, and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also...participation in rituals associated with certain stages of life..."

United Nations, Human Rights Committee, General Comment 22, para. 4, The right to freedom of thought, conscience and religion (Art. 18), U.N.Doc. CCPR/C/21/Rev.1/Add.4 (1993) [hereinafter HRC General Comment 22].

burial sites, and the rites and methods by which a religious group buries its dead, are a manifestation of that group's religious beliefs.

The importance of cemeteries to religious groups was specifically noted by the Special Rapporteur on Freedom of Religion and Belief in her report on the country visit to Israel and the Occupied Palestinian Territory, which stated "that places of worship, religious sites and cemeteries have more than a material significance for the religious community attached to them. General Assembly resolution 55/254 calls upon all States to exert their utmost efforts to ensure that religious sites are fully respected and protected as well as to adopt adequate measures aimed at preventing such acts or threats of violence."<sup>141</sup> Cemeteries are thus singled out as repositories of a group's cultural heritage, in addition to being of unique religious significance.

The disinterment and desecration of burial sites belonging to a specific minority religious group, and the subsequent disposition of the remains without consultation with that group, nor that group's knowledge of their whereabouts, constitutes a violation of the right of a religious group to manifest its religious beliefs. The importance of cemeteries as religious sites where individuals and groups manifest their religious beliefs was confirmed by the Special Rapporteur on freedom of religion and belief in response to a complaint regarding desecration of Hmong graves in Thailand.<sup>142</sup> The disinterment of remains and the desecration of the Mamilla cemetery that has taken place, with the approval and participation of the Israeli government and its agents, therefore violate the rights of countless Jerusalemites whose ancestors are buried there, and those of Muslims everywhere, to manifest their religion. By degrading and disrespecting the beliefs of Muslims regarding the sanctity of their burial sites, and the practices attached to this belief, Israel is not only curtailing the ability of Muslims to visit the graves of deceased relatives; it is also undermining their belief in the eternal sanctity of cemeteries, and making evident its lack of respect for the religious beliefs of a minority religious group under its control.

The desecration committed in the process of construction of the SWC "Center for Human Dignity – Museum of Tolerance" constitutes a violation of this right, regardless of any previous development on the site. The IAA's approval of the site for construction, in spite of the clear evidence that the site was replete with Islamic graves of historic and archaeological significance, indicates the Israeli Government's complicity in the contempt displayed by the Museum builders themselves for the cemetery's sanctity,

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<sup>141</sup> Report of SR on freedom of religion and belief, supra note 89, at para. 39.

<sup>142</sup> Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief, Summary of cases transmitted to Governments and replies received, A/HRC/4/21/Add.1, March 8, 2007, at para. 290 (reiterating her previous assertion that "different types of buildings or properties that have more than a material signification for the religious community that is attached to it, such as cemeteries... have been targeted," and that "places of worship are an essential element of the manifestation of the right to freedom of religion or belief," and "attacks or other forms of restriction on places of worship or other religious sites and shrines in many cases violate the right not only of a single individual, but the rights of a group.").

and for the dignity of those interred and their descendants. This action confirms and compounds the preceding decades of neglect, destruction and desecration carried out by Israel in the form of construction of municipal parking lots and other facilities in parts of the cemetery, which have been consistently opposed by Palestinians.

### **C. Right to Freedom from Discrimination**

Numerous international human rights instruments, to all of which Israel is bound, articulate the prohibition on discrimination against individuals and groups. This includes discrimination against individuals on the basis of religion, as prohibited in the UDHR and the ICCPR,<sup>143</sup> and discrimination against minority groups within a state, as prohibited by the ICCPR, the International Convention on the Elimination of All Forms of Discrimination (ICERD), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>144</sup> International bodies have reiterated the importance of protecting the rights of religious groups that make up a minority population. The Human Rights Committee noted that it “views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they...represent religious minorities that may be the subject of hostility on the part of a predominant religious community.”<sup>145</sup> The Human Rights Commission urged states parties to ensure that their officials do not engage in discrimination, and that they apply the laws equally regardless of an individual or group’s religion.<sup>146</sup>

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<sup>143</sup> UDHR, supra note 140, at Art. 2

Art. 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

ICCPR, supra note 140, Art. 2(1).

Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as...religion .

<sup>144</sup> ICCPR, supra note 140, Arts. 2(1), 26, 27

Article 26: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as [...] religion [...].”

Article 27: “ In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), entered into force Jan. 4, 1969; ratified by Israel Jan. 3, 1979 [hereinafter ICERD].

Article 5: “...States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] (d) Other civil rights, in particular: ... (vii) The right to freedom of thought, conscience and religion”.

International Covenant on Economic Social and Cultural Rights, G.A. res. 2200A, U.N. Doc A/6316 (1966), entered into force Jan. 3, 1976; ratified by Israel Oct. 3, 1991 [hereinafter ICESCR]

Art. 2 (2) : “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind such as ... religion...”

<sup>145</sup> HRC General Comment 22, supra note 140, at para. 2.

<sup>146</sup> Commission on Human Rights, Elimination of all forms of intolerance and of discrimination based on religion or belief, Human Rights resolution 2005/40, U.N. Doc. E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005)

para. 4 (g) : “Urges States:... To ensure that all public officials and civil servants, including members of law enforcement bodies, the military and educators, in the course of their official duties, respect different religions and beliefs and do not discriminate on the grounds of religion or belief, and that all necessary and appropriate education or training is provided.”.

Israel has clearly failed in its obligation to ensure that religious minorities in its State are equally protected by the laws. This failure extends to equal protection of their sacred and religious sites. The Special Rapporteur on Freedom of Religion and Belief specifically cited Israel's discriminatory treatment of non-Jewish holy sites, noting that all places designated as holy sites up to 2007 were Jewish, none being Muslim or Christian. The report recommended:

that the Government of Israel issue as soon as possible nonselective regulations and designate holy sites on a non-discriminatory basis. The unique spiritual and religious dimension of the holy sites and their importance for believers in the whole world need to be appropriately taken into account.<sup>147</sup>

The Israeli government's failure to protect, and its complicity in destroying, the Mamilla cemetery is thus a violation of its obligation to ensure equal protection of the laws to its religious minorities. The progressive destruction of the Mamilla cemetery by Israeli authorities constitutes discriminatory conduct when compared to the treatment of Jewish holy sites, and especially when compared to the care and attention lavished on the Jewish cemetery on the Mount of Olives. It is also clear that Israel's treatment of the Mamilla cemetery is characteristic of its treatment of other non-Jewish religious sites throughout Israel and the Occupied Palestinian Territory, including other cemeteries. The IAA's disregard of the findings of its Chief Excavator in charge of excavations on the Museum site and its attempt to misrepresent such information to the Israeli High Court makes clear its intentional degradation of the religious, historical and cultural value of the site to Muslims. It is evident that Israel's disdain for and destruction of sacred sites such as the Mamilla cemetery extends to the religious, cultural and historical heritage sites of all non-Jewish groups, and is part of a larger pattern of discrimination.

#### **D. Right to Culture and Right to Family**

The rights to culture and family are enshrined in the UDHR, the ICCPR, and the ICESCR.<sup>148</sup> The right to culture encompasses the right to engage in the cultural life of the community. The rights of minorities to engage in their own cultural life, including religious life, are protected in the ICCPR.<sup>149</sup>

Burial of the dead and visitation of graves is both a cultural and religious rite, the practice of which is important to all communities. The sanctity of the dead and of their burial places is unequivocal in Islam, as is the prohibition on disinterment of the dead. The complicity of the Israeli government in destroying an important Muslim cemetery and desecrating the remains therein therefore constitutes a violation of Palestinian and Muslim rights to practice their culture and religion.

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<sup>147</sup> Report of SR on freedom of religion and belief, *supra* note 89, at para. 77.

<sup>148</sup> UDHR, *supra* note 140, Art. 27; ICESCR, *supra* note 144, Art. 15(a).

<sup>149</sup> ICCPR, *supra* note 140, Art. 27.

These actions also infringe on the right to family, as codified in the UDHR, the ICCPR and the ICESCR, which prohibit arbitrary interference with family and entitle the family to State protection.<sup>150</sup> By participating in the disturbance of Muslim graves, Israel is violating the rights of Palestinians and Muslims, including the Descendant Petitioners, to ensure the sanctity of their ancestors' burial sites and engage in burial and grave visitation practices involving their families and ancestors.

## VI. CONCLUSION

As a State Party to the instruments, and as a state bound by customary international law principles, cited in this complaint, Israel is obligated to protect the rights enshrined therein. By soliciting, approving and facilitating the construction of a so-called "Center for Human Dignity – Museum of Tolerance" in the heart of the ancient Muslim cemetery of Mamilla, itself in the heart of the Holy City of Jerusalem, Israel is violating the human rights of the current Individual petitioners who have ancestors buried there, as well as of all Muslims and others who believe in the sanctity of their cemeteries and others who regard the cemetery as part of the collective cultural heritage of humankind,.

The Individual Petitioners, on behalf of their extended families in Jerusalem and throughout the world and others so affected, therefore request the following:

I. That the Special Rapporteur on Freedom of Religion and Belief, the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, and the Independent Expert in the Field of Cultural Rights urgently demand that the Government of Israel:

1. Immediately halt further construction of the "Museum of Tolerance" on the Mamilla cemetery site;
2. Document and reveal to the petitioners the whereabouts of all human remains and artifacts, as well as archaeological fragments and monuments exhumed in the construction;
3. Recover and rebury all human remains where they were originally found, in coordination with, and under the supervision of, the competent Muslim authorities in Jerusalem; and,
4. Declare the entire historic site of the Mamilla cemetery an antiquity, to be preserved and protected henceforth by its rightful custodians, the Muslim Waqf (public endowment) authorities in Jerusalem.

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<sup>150</sup> UDHR, supra note 140, Arts. 12, 16(3);

ICCPR, supra note 140, Arts. 17, 23;

Article 17: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 23: The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

ICESCR, supra note 144, Art. 10:

Article 10: The States Parties to the present Covenant recognize that:

The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children...



II. Based on the mandate laid out in the Human Rights Council resolution of October 21, 2009, petitioners request that the United Nations High Commissioner for Human Rights consider this complaint on an urgent basis and investigate and report on Israel's violation of the above human rights, which, together with other Israeli actions that degrade or damage non-Jewish religious sites, constitute a pattern of gross violations of the human rights of Palestinians and Muslims.

III. That the Director General of UNESCO consider this complaint in light of existing UNESCO resolutions on the subject and the human rights violations alleged herein, and coordinate efforts with the above-mentioned United Nations officials in order that the Mamilla cemetery, a cultural and religious heritage site of great value, be preserved and protected.

IV. That the Government of Switzerland, in its capacity as depository of the Fourth Geneva Convention, consider this issue in the context of resuming the High Contracting Parties' Conference to the Fourth Geneva Convention.