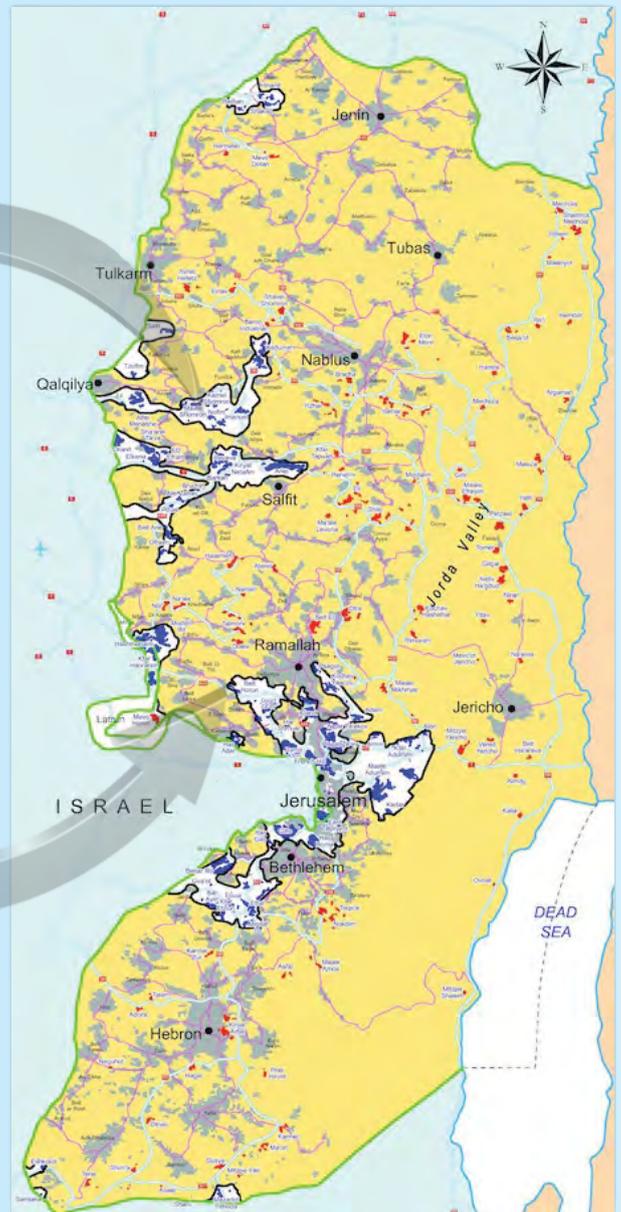




EXPLORING THE ILLEGALITY OF LAND SWAP AGREEMENTS UNDER OCCUPATION





AL-HAQ

Al-Haq
P.O.Box: 1413 Ramallah.
Palestine
Tel: +972 (2) 2954646/7/9
Fax: +972 (2) 2954903
Email: haq@alhaq.org
www.alhaq.org

Author: Elisabeth Koek

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Any errors are those of the author alone.



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I. Executive Summary

'Exploring the Illegality of 'Land Swap' Agreements under Occupation'

In recent months, the international community has intensified its call to re-launch negotiations between Israel and Palestine based on the 1967 borders with 'mutually agreed land swaps.' Despite differences in the amount of territory to be swapped, the propositions, presented by the Palestine Liberation Organisation (PLO), Israel and the United States, revolve around Israel's retention of the major settlement blocs in the West Bank, including East Jerusalem.

Al-Haq's position paper: '[Exploring the Illegality of 'Land Swap' Agreements under Occupation](#)' examines the legal implications of 'land swap' agreements concluded between Israel and the Palestinian representatives whilst the Israeli occupation of the West Bank, including East Jerusalem, and the Gaza Strip is ongoing. The paper provides an overview of the applicable international legal framework. It is argued that while the Occupying Power and any actual or purported authorities of the occupied territory may conclude 'special agreements' during occupation, the law of occupation prohibits both the Occupying Power and the authorities of the occupied territory from derogating from the protections afforded to the occupied population.

As a natural consequence of the status of occupation, parties are not on an equal footing, thus limiting the ability of the authorities of the occupied territory to act freely – without military pressure – in the interest of the occupied population. The law of occupation prohibits the conclusion of agreements in which the imbalanced position of the two parties would coerce the authorities of the occupied territory to sign agreements infringing on the rights of the occupied population. As a result of the absolute nature of the relevant principles enshrined in the law of occupation, the representatives of the Palestinian people are prevented from concluding 'land swap' agreements during occupation. Moreover, the expression of consent to be bound by an agreement is to be without any legal effect. As a result, such transfer would not grant the Occupying Power lawful title to the territory and the sovereign rights would remain with the occupied population.

The position paper further reveals how Israel's policies and practices in the OPT amount to a form of colonialism and are part of an apartheid system. The establishment of facts on the ground through the construction and expansion of settlements and the Annexation Wall along with its associated regimes, the creation of a network of roads, and flourishing agricultural enterprises for the sole benefit of the settlers, reveal Israel's intention to permanently change the status of the occupied territory, de facto exercising sovereignty, and affecting any final status agreement.

In light of the colonial nature of Israel's presence in the OPT, it is clear that any agreement between Israel and Palestine that would allow Israel to acquire possession over the major settlement blocs in the West Bank, including East Jerusalem, will only serve to condone Israel's colonial practices and policies. Furthermore, formalising an apartheid system through the conclusion of territorial agreements will reward Israel's efforts to establish and maintain racial domination and will allow Israel to benefit from such a crime. An agreement on territorial exchange as a solution of final status issues, founded on apartheid practices, is null and void on the basis that it violates peremptory norms of international law.

Al-Haq reiterates its call on the international community to adhere to its obligations under international law. All States are under the obligation not to recognise the de facto annexation of Palestinian territory upon which settlements are built, along with the exercise of colonialism and the system of apartheid put in place by Israel in the OPT, as lawful, not to render aid or assistance in maintaining it and to cooperate to bring these violations to an end. In light of the obligations incumbent upon every State, the politically motivated call for 'mutually agreed land swaps' is irreconcilable with third party States' responsibilities under international law. Instead of recognising the situation as unlawful and endeavouring to bring these violations to an end, third party States are advocating to formalise Israel's violations, effectively condoning an existing illegal situation by calling for the conclusion of disputable legal agreements exchanging land whilst occupation is ongoing.

Al-Haq also strongly warns the Palestinian people and their representatives of the impending risks associated with 'land swap' agreements that would violate their rights, most importantly their right to self-determination.

1. Introduction and Factual Context

In the wake of the Arab Spring, recent changes in the Middle East and the Palestinian initiatives at the United Nations (UN), several members of the international community have called for a kick-start to the peace process between Israel and Palestine.¹ The aim is to re-launch negotiations between the two parties on the basis of the 1967 borders with 'mutually agreed land swaps.'

On 14 November 2011, the Palestinians put forward a proposal in which they agree to a 1.9 per cent 'land swap' of West Bank territory with Israel.² This proposal is one of several propositions to exchange territory presented by the Palestine Liberation Organisation (PLO),³ Israel⁴ and the United States⁵ in recent years. Despite differences in the amount of territory to be swapped, the proposals revolve around Israel's retention of the major settlement blocs in the West Bank, including East Jerusalem. The settlements contained in potential 'land swap' agreements may include the majority of the settlements in East Jerusalem,⁶ as well as Beitar Illit, Modi'in Illit, Kedumim, Ariel, Ma'ale Adumim and others, in exchange for sparsely-populated farmland adjacent to the Gaza Strip, the Sinai Desert and part of the West Bank, and possibly territory in the Naqab Desert (Negev).⁷

From the outset of the negotiations between Israel and the PLO, Al-Haq has emphasised that the PLO is legally prevented from entering into agreements with Israel that would undermine the rights of the Palestinian people under international law, even if any such agreements were borne out of mutual consent between Israel and the PLO. Al-Haq is therefore deeply concerned about the continuous and intensified call for 'land swaps' from the international community. While the exchange of territory may form part of the solution of final status issues, international law raises serious questions about the validity of any 'land swap' agreement whilst the occupation is ongoing.

¹ For reference, see United States President Obama speech on the Middle East (19 May 2011) <<http://www.guardian.co.uk/world/2011/may/19/barack-obama-speech-middle-east>> accessed 8 December 2011; European Union High Representative for Foreign Affairs and Security Policy Baroness Ashton's statement (15 June 2011) <<http://www.france24.com/en/20110615-eus-ashton-due-mideast-peace-process>> accessed 8 December 2011; and European Parliament President Jerzy Buzek's statement (14 June 2011) <<http://www.europarl.europa.eu/en/media-professionals/content/20110614SHL89160/html/Official-visit-by-EP-President-Jerzy-BUZEK-to-the-Palestinian-Territories-77952>> accessed 8 December 2011.

² See Map 1 in the Annex to this paper. This map is likely the closest map published of what the 1.9 per cent proposition entails. B Ravid, 'Nethanyahu balks at Abbas Proposal for Palestinian State Border' *Haaretz* (1 December 2011) <<http://www.haaretz.com/print-edition/news/netanyahu-balks-at-abbas-proposal-for-palestinian-state-borders-1.398816>> accessed 8 December 2011.

³ See Maps 1 and 2 in the Annex to this paper. The Palestinian offers put forward in 2008 included the annexation by Israel of virtually all of the Israeli settlements in East Jerusalem, which are illegal under international law. However, the Palestinian representatives did not propose to swap any of the major settlements blocs in the West Bank. G Carlstrom, 'The "napkin map" revealed: the Palestine papers include a rendering of the Israeli land swap map presented in mid-2008 to Mahmoud Abbas' *Al Jazeera* (23 January 2011) <<http://www.aljazeera.com/palestinepapers/2011/01/2011122114239940577.html>> accessed 8 December 2011.

⁴ See Maps 3a, 3b and 4 in the Annex to this paper. Israel's proposition includes the annexation 10.6 per cent of the West bank, including East Jerusalem. G Carlstrom (n 3).

⁵ On 20 January 2011, Washington Institute for Near East Policy released a proposal that is outlined in three possible maps. Under the proposal, 68 per cent to 80 per cent of the settlements in the Occupied Palestinian Territory (OPT) would be annexed by Israel, and the Palestinian State would receive Israeli lands adjacent to the Gaza Strip, the Sinai Desert and parts of the West Bank. <<http://www.washingtoninstitute.org/interactiveMaps/index.html>> accessed 8 December 2011.

⁶ Among others these reportedly include Ramat Eshkol, Gilo, Ramot, French Hill, Pisgat Ze'ev, Har Homa and the Jewish Quarter of the Old City. See G Biger, 'Blueprint for Land Swaps' *Haaretz* (29 May 2011) <<http://www.haaretz.com/print-edition/opinion/blueprint-for-land-swaps-1.364664>> accessed 8 December 2011.

⁷ *Ibid.*

2. Preliminary Legal Issues

The proposed agreements on territorial exchange between Israel and the representatives of the Palestinian people are premised on the cession of territory by the Palestinian representatives to Israel. Cession is a method of acquiring territory, based on "the [peaceful] transfer of sovereignty over State territory by the owner-State to another State."⁸ In principle, a sovereign State is free to transfer any of its own territories to another. Paramount to the validity of cession is the full consent of the ceding authorities.⁹

Within the context of the current conflict between Israel and the Palestinians, the cession of territory is put forward as the territorial component of a 'peace agreement.' Despite the prevalence of documents that could be described as 'peace agreements,' the term remains largely undefined.¹⁰ 'Peace agreements' as such have no separate or special legal basis in international law. They are simply a treaty between States, producing legal obligations, with the same legal regime applicable to its conclusion and contents.¹¹

The conclusion of the proposed agreements on territorial exchange will not terminate Israel's prolonged occupation of the Occupied Palestinian Territory (OPT). The termination of a state of occupation is a factual issue. The Occupying Power ends its effective control – being thereby no longer capable of exercising its authority – of an occupied territory by withdrawing from it.¹² It is generally accepted that forces are considered "present" when the Occupying Power can, within a reasonable time, send detachments of troops to make its authority felt within the occupied area.¹³ As a consequence of the loss of effective control over the territory by the Occupying Power, and by extension the termination of the occupation, the law of belligerent occupation ceases to apply.



The conclusion of the proposed agreements on territorial exchange will not terminate Israel's prolonged occupation of the Occupied Palestinian Territory (OPT).



⁸ L Oppenheim, *International Law – A Treatise* (8th edn) (H. Lauterpacht (ed), Longman, London, 1952) Vol. I – Peace, 547.

⁹ L Seokwoo, 'Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal' (2000) 16 Connecticut Journal of International Law, 1-22.

¹⁰ C Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 American Journal of International Law, 373-412.

¹¹ C Bell, *Peace Agreements and Human Rights* (Oxford University Press, Oxford, 2000) 293, 304-305.

¹² K Mastorodimos, 'How and When Do Military Occupations End?' (2009) 21 Sri Lanka Journal of International Law, 109-152.

¹³ E Benvenisti, 'The Law on the Unilateral Termination of Occupation' in T Giegerich T and U Heinz (eds), *A wiser century? Judicial Dispute Settlement, Disarmament and The Laws of War 100 Years after the Second Hague Conference*, Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel, Band 173 (Duncker & Humblot, Berlin, 2009) 371-382. See also, the guidelines on effective control as set out by the International Criminal Court for the former Yugoslavia (ICTY) in *Prosecutor v Dusko Tadic* (Judgment, Appeals Chamber IT-94-1-A (15 July 1999), paragraph 131.

The law of belligerent occupation also ceases to apply when the nature of the occupation changes from a hostile occupation to a consensual occupation through the conclusion of an agreement between the authorities of the occupied territory and the Occupying Power allowing – for a period of time – for the uninterrupted presence of foreign troops in the formerly occupied territory.¹⁴ However, considering the extensive and prolonged nature of the Israeli occupation – Israel has been occupying the entire Palestinian territory since 1967 – and the inherent imbalance of power between Israel and the Palestinian representatives, the latter are precluded from expressing valid consent to a foreign presence on their territory.¹⁵ As long as Israel exercises effective control, the interests of the occupied population remain protected by the law of belligerent occupation.



As long as Israel exercises effective control, the interests of the occupied population remain protected by the law of belligerent occupation.



¹⁴ This has been confirmed by the International Court of Justice (ICJ). See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Rep 2005, paragraph 104 (hereafter: *Armed Activities Congo/Uganda*).

¹⁵ From the outset of the occupation, the Ugandan occupying forces occupied only a small region of the Democratic Republic of Congo. Israel, however, controls the whole of the Palestinian territory and maintains a historical position of dominance.

3. International Legal Framework

3.1 The Law of Belligerent Occupation

3.1.1 General Principles of International Humanitarian Law

As the Occupying Power in the West Bank, including East Jerusalem, and the Gaza Strip, Israel's obligations under international humanitarian law (IHL) are enshrined in the Regulations Annexed to the Hague Convention IV Respecting the Laws and Customs of Wars on Land of 1907 (Hague Regulations), reflective of customary international law, and in the Fourth Geneva Convention Concerning the Protection of Civilian Persons in Time of War of 1949 (Fourth Geneva Convention), for the most part reflective of customary international law.¹⁶ Countless resolutions of the UN General Assembly¹⁷ and the UN Security Council¹⁸ as well as statements issued by governments worldwide have all affirmed the *de jure* applicability of the Fourth Geneva Convention to the OPT. Israel continues to maintain a practice that is contrary to this near universal position,¹⁹ which has also been confirmed by the ICJ in its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion on the Wall).²⁰ Furthermore, ICJ jurisprudence and practice confirm that obligations stemming from human rights conventions ratified by the Occupying Power also apply in the occupied territory.²¹

Since occupation is by definition temporary, the Occupying Power does not acquire sovereignty over the occupied territory. The sovereign rights over the territory remain with the occupied population, but their ability to exercise these sovereign rights is restricted by the occupation, which prevents the occupied population from effectively controlling their territory. Under the law of belligerent occupation, the Occupying Power acts merely as the *de facto* administrator of the occupied territory. The administration of the territory is intended to preserve the sovereign rights of the occupied population and to protect the occupied population and its property from exploitation by the Occupying Power.²²

3.1.2 Inderogability of the Protection afforded to the Occupied Population

While the Occupying Power and any actual or purported authorities of the occupied territory may conclude 'special agreements' during occupation,²³ Articles 7, 8 and 47 of the Fourth Geneva

¹⁶ UNSC Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council (27 May 1994) UN Doc S/1994/674, paragraph 53.

¹⁷ See for example UNGA Res 56/60 (10 December 2001) UN Doc A/RES/56/60 and UNGA Res 58/97 (17 December 2003) UN Doc A/RES/58/97.

¹⁸ See for example UNSC Res 1544 (19 May 2004) UN Doc S/RES/1544.

¹⁹ The Israeli Government has declared that it will only abide by some 'humanitarian provisions' enshrined therein, without specifying which provisions it regards as having humanitarian character. See Al-Haq, 'Legitimising the Illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory' (25 November 2010) 11-13 <<http://www.alhaq.org/publications/publications-index/item/legitimising-the-illegitimate>> accessed 8 December 2011.

²⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Rep 2004, paragraph 101 (hereafter: *Advisory Opinion on the Wall*).

²¹ *The Legality of Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Rep 1996, paragraph 25; *Armed Activities Congo/Uganda* (n 14) paragraph 175; *Advisory Opinion on the Wall* (n 20) paragraph 102-113.

²² E Benvenisti, *The International Law of Occupation* (Princeton University Press, New Jersey, 1993) 28.

²³ The Fourth Geneva Convention expressly mentions the possibility of special agreements to be concluded which may concern, for instance, the establishment of hospital and safety zones and localities (Article 14), the establishment of neutralised zones (Article 15), the evacuation of besieged areas (Article 17), relief shipments for internees (Article 108). See JS Pictet, *Commentary on the Fourth Geneva Convention* (ICRC, Geneva, 1958) 66.

Convention stipulate that no such agreement can deprive the occupied population of the protection granted to them by the Convention. Affirming the inderogability of protection afforded to the occupied population, both the Occupying Power and the authorities of the occupied territory cannot derogate from their obligations vis-à-vis the occupied population. The inderogability of protection is not limited to the protection granted by the Geneva Conventions, but should be interpreted as an expression of a more general principle: the principle of inderogability of all protections afforded by the law of belligerent occupation.²⁴ The protections conferred upon the occupied population under the Fourth Geneva Convention and the other safeguards – including those protecting property rights – afforded by the Hague Convention are not mutually exclusive, nor does the former replace the protections of the latter.²⁵ In accordance with the object and purpose of the law of belligerent occupation, the supplementary relationship between the protections of the Fourth Geneva and of the Hague Regulations supports the extension of the inderogability of the protection to encompass other sources of the law of belligerent occupation, serving its paramount purpose of providing protection to the occupied population.²⁶

As a natural consequence of the state of belligerent occupation, parties are not on an equal footing. This limits the ability of the authorities of the occupied territory to act freely – without military pressure – in the interest of the occupied population. The provisions set out in the Fourth Geneva Convention prohibit the conclusion of agreements in which the imbalanced position of the two parties would coerce the authorities of the occupied territory to sign agreements hampering the rights of the occupied population.²⁷

“**The provisions set out in the Fourth Geneva Convention prohibit the conclusion of agreements in which the imbalanced position of the two parties would coerce the authorities of the occupied territory to sign agreements hampering the rights of the occupied population.**”

Article 7(1) of the Fourth Geneva Convention strictly prohibits the possibility of concluding agreements that “adversely affect the situation of protected persons,” or “restrict the rights which it confers upon them.” Protected persons – those who find themselves in the hands of the Occupying Power – should enjoy the protection of the Convention for as long as they are under occupation.²⁸ When assessing whether an agreement between the Occupying Power and the authorities of the occupied territory is in conformity with the law of belligerent occupation, it needs to be established that the parties have not derogated from their obligations under the law of belligerent occupation.²⁹ Notwithstanding, the parties are encouraged to undertake measures in the interests of the protected persons in compliance with international human rights law. This principle corroborates the applicability of international human rights law in situations of conflict, including occupation.³⁰

²⁴ The protection afforded under the law of belligerent occupation refers to the whole body of safeguards and is not restricted to the fundamental rights of the individual, comprising of the right to physical, moral and intellectual integrity. JS Pictet (n 23) 70-72.

²⁵ Y Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law* (Martinus Nijhoff Publishers, Leiden and Boston, 2009) 115.

²⁶ On the supplementary relationship between protections afforded by the Fourth Geneva Convention and the Hague Regulations, see Fourth Geneva Convention (1949) Article 154 and the Commentary on this Article, JS Pictet (n 23) 613-621.

²⁷ C Bell (n 11) 185.

²⁸ JS Pictet (n 23) 72.

²⁹ JS Pictet (n 23) 70-71.

³⁰ L Doswald Beck, ‘The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?’ (2006) 864 *International Review of the Red Cross*, 881, 892.

Article 47 of the Fourth Geneva Convention upholds the inviolability of the rights conferred upon the occupied population. Firstly, Article 47 prevents the Occupying Power from using agreements concluded with the authorities of the occupied territory as a means to free itself from the obligations and restrictions incumbent upon it under the law of belligerent occupation. Secondly, it prevents the Occupying Power from forcing the representatives of the occupied population to conclude agreements that are prejudicial to the rights of protected persons,³¹ including those for the disposition of occupied territory. Finally, Article 47 also expressly stipulates that no act or agreement of annexation will have any effect on the rights of protected persons, who should in all circumstances continue to enjoy the rights and protection afforded to them by the law of belligerent occupation.³²

Stipulating that States bound by the law of belligerent occupation cannot absolve themselves of their obligations towards protected persons, even if the latter had explicitly expressed their consent,³³ Article 8 absolutely excludes the renouncement of the protection of the law of belligerent occupation in all circumstances by the protected persons themselves.

As a result of the absolute nature of the principle enshrined in Articles 7 and 47 of the Fourth Geneva Convention, the representatives of the Palestinian people are prevented from concluding ‘land swap’ agreements during occupation. The transfer of territory by cession requires the full consent of the ceding State to renounce its sovereign rights over parts of the occupied territory.³⁴ However, sovereignty is protected and cannot be transferred under occupation. The representatives of the Palestinian people cannot consent to any agreement, which derogates from the protections afforded to the occupied population during occupation.

“**As a result of the absolute nature of the principle enshrined in Articles 7 and 47 of the Fourth Geneva Convention, the representatives of the Palestinian people are prevented from concluding ‘land swap’ agreements during occupation.**”

Therefore, the expression of consent to be bound by an agreement, which by virtue of the imbalance of power between the two parties is obtained through the coercion of another State, is to be without any legal effect.³⁵ As a result, such transfer would not grant the Occupying Power lawful title to the territory and the sovereign rights would remain with the occupied population.³⁶

³¹ Instances in which the Occupying Power pressurised the representatives of the occupied population to conclude agreements include: banning of activities of humanitarian organisations, changing the status of protected persons, and tolerating the forcible enlistment or deportation of protected persons by the Occupying Power. See JS Pictet (n 23) 274.

³² JS Pictet (n 23) 275-276.

³³ The Occupying Power is prevented from taking refuge behind the will of protected persons to justify withholding application either in entirety or in part of the Convention. JS Pictet (n 23) 74, 80.

³⁴ G Schwarzenberger, *International Law, Vol I, International Law as Applied by International Courts and Tribunals* (Stevens, London, 1957) 303.

³⁵ This is in accordance with Article 52 of the Vienna Convention on the Law of Treaties (1969).

³⁶ M Shaw, *International Law* (6th edn) (Cambridge University Press, Cambridge, 2008) 499-502.

3.1.3 The Protection of Property in Occupied Territory

In times of belligerent occupation, the property of the occupied population is protected from exploitation by the Occupying Power. IHL distinguishes between private and public property, with preferential treatment granted to private property, and prohibits the Occupying Power from seizing and destroying both immovable and moveable property, barring exceptional circumstances of absolute imperative military necessity.³⁷

The usufruct rule enshrined in Article 55 of the Hague Regulations protects immovable public property from being exploited by the Occupying Power. Under this rule, the Occupying Power may take possession of public property, including land and natural resources, but does not acquire title of such property.³⁸ The usufruct rule requires the Occupying Power to safeguard the capital of such property, thus limiting the Occupying Power's ability to use and administer land and natural resources belonging to the occupied territory.³⁹

Similarly, under Article 46 of the Hague Regulations, private property in occupied territory is prohibited from being confiscated. A belligerent occupant may lawfully subject privately owned property in the occupied territory to its military needs by requisitioning it.⁴⁰ Requisition of privately owned property, only demanded for the needs of the army of the occupation, is subject to compensation, but it does not transfer title to the Occupying Power.⁴¹

Article 53 of the Fourth Geneva Convention, moreover, prohibits the Occupying Power from destroying "real or personal property belonging individually or collectively to private persons, or to the State, except where such destruction is rendered absolutely necessary by military operations."

From the outset of the occupation, Israel has appropriated public land as well as privately owned land belonging to the Palestinians under various complex legal mechanisms. According to official data of the Israeli Civil Administration, Palestinians privately own more than 30 per cent of the total land area on which the settlements sit.⁴²

Israel's policy of land appropriation from Palestinians in occupied territory is an extensive and systematic practice, justified by ostensible security reasons and military necessity. The law of belligerent occupation recognises the right of the Occupying Power to appropriate land in occupied territory, but only if carried out to satisfy its military needs. However, Israel's policy of land appropriation does not meet the military needs test. Once Israel has appropriated Palestinian land, it is solely allocated to Jewish settlers. Agricultural resources and aquifers are either appropriated or

³⁷ Y Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, Cambridge, 2009) 211.

³⁸ This concept originated in ancient Roman law, which defined 'usufruct' as "[t]he right of using and enjoying the property of other people, without detriment to the substance of the property." See MB Clagget and OT Jr. Johnson, 'May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?' (1978) 3 *American Journal of International Law*, 567-568.

³⁹ Y Dinstein (n 37) 213, 214-218.

⁴⁰ Hague Regulations (1907) Article 52(2).

⁴¹ Y Dinstein (n 37) 224-227.

⁴² The major settlements blocs in the West Bank are built on over 40 per cent of Palestinian privately owned land, including 86.4 per cent of Ma'ale Adumim, 44.3 per cent of Givat Ze'ev, 47.7 per cent of Kedumim, and 35.1 per cent of Ariel. See Peace Now, 'GUILTY! Construction of Settlements upon Private Land – Official Data' (2007) <http://peacenow.org.il/eng/sites/default/files/Breaking_The_Law_formal%20data_March07Eng.pdf> accessed 8 December 2011; Peace Now, 'One Violation Begets Another: Israeli Settlement Building on Private Palestinian Property' (November 2006) <http://peacenow.org.il/eng/sites/default/files/Breaking_The_Law_in_WB_nov06Eng.pdf> accessed 8 December 2011.

destroyed and countless olive trees are uprooted in the process of building the settlements and their associated infrastructure.⁴³ It cannot be claimed that such practices are in response to the military needs of the Occupying Power's forces in the occupied territory and as such constitute a violation of Articles 55, 46 and 52 of the Hague Regulations.⁴⁴

3.1.4 Prohibition of Transfer of Civilian Population into Occupied Territory

Under Article 49(6) of the Fourth Geneva Convention, "[t]he Occupying Power shall not deport or transfer part of its own population into the territories it occupies." The Israeli settlement activity in the OPT is in direct contravention of this provision. Numerous UN resolutions⁴⁵ and the 2004 ICJ Advisory Opinion on the Wall have confirmed that Israeli settlements in the OPT are illegal and constitute a blatant breach of international law.⁴⁶ The inclusion of the prohibition of transfer of the Occupying Power's civilian population in the Fourth Geneva Convention aims to enhance the protection of the civilian population of the occupied territory by preventing the Occupying Power from bringing about a fundamental demographic change in its composition.⁴⁷

⁴³ Al-Haq, 'Unmasking the "Freeze": Israel's Alleged Moratorium on Settlement Construction Whitewashes Egregious Violations of International Law' (26 April 2011) 10-11 <<http://www.alhaq.org/publications/publications-index/item/unmasking-the-freeze>> accessed 8 December 2011.

⁴⁴ Respect for private property under this provision does not mean merely protection from loss of ownership: for a breach to occur it is enough if the owner is actually prevented from exercising his rightful prerogatives. See *Krupp trial (Krupp et al.)* (US Military Tribunal, Nuremberg, 1948) 10 LRTWC 69, 137-138.

⁴⁵ For example: UNSC Res 237 (14 June 1967) UN Doc S/RES/237, UNSC Res 271 (15 September 1969) UN Doc S/RES/271, UNSC Res 446 (22 March 1979) UN Doc S/RES/446 and UNSC Res 465 (1 March 1980) UN Doc S/RES/465. See also, UNGA Res 56/60 (10 December 2001) UN Doc A/RES/56/60 and UNGA Res 58/97 (17 December 2003) UN Doc A/RES/58/97.

⁴⁶ *Advisory Opinion on the Wall* (n 20) paragraphs 115-122. The Court declared that this provision prohibits not only forcible transfers, "but also any measures taken by an Occupying Power in order to organise or encourage transfers of parts of its own population into the occupied territory." *Ibid.*, paragraph 120.

⁴⁷ An explicit reference to the issue of 'demographic composition' of the occupied territory is incorporated in UNSC Res 465 (1 March 1980) UN Doc S/RES/465.

3.2 General Principles of International Law

3.2.1 Revealing the Colonial Character of Israel's Occupation

The right to self-determination holds that a people of a defined territorial unit have the right “freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the [UN] Charter.”⁴⁸ The exercise of this right could result in complete independence, integration with a neighbouring State, free association with another State or any other status decided upon by the people.⁴⁹ The right to self-determination includes the people's exercise of permanent sovereignty over natural resources, including land and water resources,⁵⁰ protecting their ability to freely dispose of their natural wealth and resources in accordance with their interests of national development and well-being.⁵¹ Recognised as a peremptory norm of international law (*jus cogens*),⁵² the obligation to ensure the enjoyment of the right to self-determination by peoples is owed by each State to the international community as a whole (*erga omnes*).⁵³

Under international law, people are entitled to self-determination if they are subject to foreign occupation, colonial domination, or a racist regime. Since 1967, the Palestinian people are undeniably subject to the Israeli foreign occupation, and their right to self-determination has since been recognised by the UN General Assembly,⁵⁴ the UN Security Council,⁵⁵ and the ICJ.⁵⁶

Israel's policies in the OPT, however, also amount to a form of colonialism.⁵⁷ Colonialism can be distinguished from other forms of foreign domination by an open claim to sovereignty by the dominant power or where a dominant power adopts measures that deliberately deny – or demonstrate an intention to permanently deny – the people of the territory the full exercise of their sovereign rights and their right to self-determination.⁵⁸ The establishment of the major settlements blocs in the West Bank, including East Jerusalem, and the creation of a network of roads and flourishing agricultural enterprises for the sole benefit of the settlers reveal Israel's intention to permanently change the status of the occupied territory, de facto exercising sovereignty, and affecting any final status agreement. The presence of settlements aims to permanently deny the Palestinian population

48 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV).

49 M Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8 *European Journal of International Law*, 478-507.

50 The principle of permanent sovereignty over the natural resources of the State is reflective of customary international law. See *Armed Activities Congo/Uganda* (n 14) paragraph 244.

51 A Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in E Playfair (ed.), *International Law and the Administration of the Occupied Territories* (Clarendon Press, Oxford, 1992) 426.

52 *Armed Activities Congo/Uganda* (n 14) paragraph 64; *Ibid*, Separate Opinion of Judge Ad Hoc Dugard, paragraphs 4, 10. See also, A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995) 320; Y Arai-Takahashi (n 25) 66.

53 See further C Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, Cambridge, 2005) 263-305.

54 UNGA Res 58 (22 December 2003) UN Doc A/RES/58/163.

55 UNSC Res 242 (22 November 1967) UN Doc SC/RES242.

56 *Advisory Opinion on the Wall* (n 20) paragraphs 115-122.

57 'Occupation, Colonialism, Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law' (hereafter: *Occupation, Colonialism and Apartheid Study*) (Human Science Research Council, Cape Town, 2009) 120-121 <<http://www.setav.org/ups/dosya/24515.pdf>> accessed 8 December 2011. See also, Russell Tribunal on Palestine, 'Findings of the South African Session' (5-7 November 2011) 18 (hereafter: *RToP, Findings of the South African Session*) <<http://www.russelltribunalonpalestine.com/en/sessions/south-africa/south-africa-session-%E2%80%94full-findings>> accessed 8 December 2011.

58 *Occupation, Colonialism and Apartheid Study* (n 57) 120-121.

the exercise of their right to self-determination by fragmenting the territory of the OPT⁵⁹ and preventing the Palestinian people from exercising sovereignty over natural resources. The policy of annexation-by-proxy provides a stark indicator of Israel's intent to unlawfully exercise permanent control in these blocs.

The prohibition of colonialism, codified in the UN General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960⁶⁰ (Declaration on Colonialism), rejects all forms of colonial domination on grounds that it violates fundamental norms of human rights and is a threat to international peace and security. The Declaration on Colonialism “solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.” Similarly, the UN General Assembly's Declaration on Friendly Relations and Co-operation among States stresses the duty of every State to promote, through joint and separate action, the realisation of the principle of equal rights and self-determination of peoples through, *inter alia*, “bringing a speedy end to colonialism.”⁶¹ Declaratory of customary international law and drawing on several principles of international law, especially the right of peoples to self-determination and the prohibition of annexation by use or threat of force, these two UN General Assembly resolutions reiterate that colonialism is absolutely contrary to international law.⁶²

Accepting the colonial nature of Israel's presence in the OPT, it is clear that any agreement between Israel and Palestine that would allow Israel to acquire sovereignty over the major settlements blocs in the West Bank, including East Jerusalem, will only serve to condone Israel's colonial practices and policies.



The presence of settlements aims to permanently deny the Palestinian population the exercise of their right to self-determination by fragmenting the territory of the OPT and preventing the Palestinian people from exercising sovereignty over natural resources.



59 *RToP, Findings of the South African Session* (n 57) 18.

60 UNGA Res 1514 (XV) (14 December 1960) UN Doc A/Res/1514(XV).

61 UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV).

62 *Occupation, Colonialism and Apartheid Study* (n 57) 120, 42.

3.2.2 Revealing the Apartheid Practices in the OPT

The prohibition of apartheid, contained in the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973, is a peremptory international legal norm, creating obligations upon every State. International law defines apartheid not as isolated acts of unlawful racial discrimination, but rather as a system of acts designed to establish and maintain the domination of one racial group over another.

Domination by the Jewish group is associated principally with transferring control over land in the OPT to exclusively Jewish use, segregating the population of the territory into Jewish and Palestinian enclaves. The major settlements blocs in the West Bank are positioned strategically to control land with the purpose of maintaining a system of domination over Palestinians and their natural resources by Jewish settlers. Israel's domestic laws and institutions are operating in the OPT to convey special rights and privileges to Jewish settlers while denying fundamental rights and freedoms to Palestinians.⁶³

The establishment of facts on the ground through the construction and expansion of settlements and the Annexation Wall along with its associated regimes has facilitated Israel's apartheid agenda with Jewish settlers enjoying the benefits of arable land, rich in natural resources. Formalising an apartheid system through the conclusion of territorial agreements will reward Israel's efforts to establish and maintain racial domination and will allow Israel to benefit from such a crime. An agreement on territorial exchange as a solution of final status issues, founded on apartheid practices, can therefore only be rendered null and void on the basis that it violates peremptory norms of international law.⁶⁴

“
Formalising an apartheid system through the conclusion of territorial agreements will reward Israel's efforts to establish and maintain racial domination and will allow Israel to benefit from such a crime.
 ”

⁶³ RToP, Findings of the South African Session (n 57) 18, 20.

⁶⁴ Vienna Convention on the Law of Treaties (1969) Article 53.

4. Recognition of an Existing Illegal Situation

The *de facto* annexation of Palestinian territory upon which settlements are built, along with the exercise of colonialism and the system of apartheid put in place by Israel in the OPT,⁶⁵ constitutes serious breaches of peremptory norms of international law, and as such result in the consequences set out in Article 41 of the ILC Draft Articles on State Responsibility. According to this provision all States are under an obligation not to recognise the situation as lawful, not to render aid or assistance in maintaining it and to cooperate to bring these violations to an end.⁶⁶

“
All States are under an obligation not to recognise the situation as lawful, not to render aid or assistance in maintaining it and to cooperate to bring these violations to an end.
 ”

In light of the obligations incumbent upon every State, the politically motivated call for 'mutually agreed land swaps' is irreconcilable with third party States' responsibilities under international law. Instead of recognising the situation as unlawful and endeavouring to bring these violations to an end, third party States are advocating to formalise Israel's violations, effectively condoning an existing illegal situation by calling for the conclusion of disputable agreements exchanging land whilst occupation is ongoing.

Such political expediency would reward Israel's policies of land appropriation for the purposes of settlement construction and expansion. The occupied population would be permanently prevented from the meaningful exercise of their right to self-determination. States are turning a blind eye to the establishment of facts on the ground, which will result in the permanent unlawful exercise of sovereignty over territory. To override these peremptory international legal norms ostensibly in the name of peace would be wholly contrary to the value of the law of belligerent occupation itself and prevent a sustainable solution to the conflict, which can be obtained only by strictly abiding to the principles of international law.

⁶⁵ RToP, Findings of the South African Session (n 57) 20.

⁶⁶ ILC Draft Articles, Articles 40 and 41. See also, M Raggazi, *The Concept of International Obligations Erga Omnes* (Oxford, Clarendon Press, 1997) 152-153; M Sassoli and A Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd edn) (ICRC, Geneva, 2011) 426; and C Tams (n 53) 263-305.

5. Possible Consequences of 'Land Swap' Agreements

Agreements on cession of territory concluded in times of belligerent occupation are null and void under international law, as they violate fundamental principles of IHL. While there are many consequences to be identified if, despite the legal implications set out above, the agreements are concluded between Israel and the representatives of the Palestinian people, the following two are of particular importance.

5.1 Private Property Claims on Lands Included in the Swap

In the case of territorial exchange, the authorities of the occupied territory, on behalf of the Palestinian people, would exchange land with private property claims attached. Such an exchange of territory does not include a transfer of the legal title over privately owned land, which will remain with the individual Palestinian owners. Israel will receive the same kind of title as the authorities of the occupied territory.⁶⁷ Not only does this further preclude the exercise of the right to private property, but it will also undermine the Palestinian individual land owners' ability to reclaim possession of their land. Agreements exchanging territory do not serve the interests of Palestinians and it is therefore essential that the Palestinian landowners raise their concerns with their representatives, and remain unwilling to accept anything that may tamper with the exercise of their private property rights.

5.2 Palestinian Archaeological Sites and Cultural Heritage

Some of the major settlement blocs in the West Bank, including East Jerusalem, are built on archaeological sites, significant to the cultural heritage and identity of the Palestinians as a people, and therefore, in accordance with the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (Convention on Protection of Cultural Property), are of significance to all mankind.⁶⁸ Such property, which includes monuments of architecture, art or history, and buildings of historical or artistic interest, are to be respected and protected in times of belligerent occupation and armed conflict. In the West Bank, and more specifically in East Jerusalem, Israel, as the Occupying Power, has not respected or protected Palestinian archaeological sites, disregarding its obligations under the Convention on Protection of Cultural Property. As an example, in February 2010, Israel announced that the al-Ibrahimi mosque, in the old city of Hebron, and Rachel's Tomb, in Bethlehem, would be designated as Israeli national heritage sites.⁶⁹ Israel has also appropriated Palestine's Christian sites in recent past, emphasising the Jewish remains of such sites above those of the other main cultures present in the land.⁷⁰ In cases of territorial exchange, it is highly unlikely that Israel will preserve Palestinian cultural heritage and identity, nor let them benefit from this property. Not only will Palestinians run the risk of losing a substantial part of their ancient heritage, they will also lose out on a welcome source of income in tourism.

⁶⁷ I Brownlie, *Principles of Public International Law* (7th edn) (Oxford University Press, Oxford, 2010) 651-652.

⁶⁸ Israel ratified the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 on 3 October 1957 and the Convention entered into force on 3 January 1958.

⁶⁹ Associated Press 'US slams Israel over designating heritage sites' *Haaretz* (25 February 2010) <<http://www.haaretz.com/news/u-s-slams-israel-over-designating-heritage-sites-1.263737>> accessed 8 December 2011.

⁷⁰ S Irving, 'Israel appropriating historical sites for colonial ends' *The Electronic Intifada* (18 April 2011) <<http://electronicintifada.net/content/israel-appropriating-historical-sites-colonial-ends/9850#.TslLbHMxDpV>> accessed 8 December 2011.

6. Conclusion

Given the disparities of power between Israel and the Palestinians by virtue of the existence of a belligerent occupation, an agreement resulting in any derogation from the protection conferred upon the Palestinians is illegal under international law and as such is null and void. The Fourth Geneva Convention explicitly prevents the parties to the conflict from entering into agreements that fail to guarantee fundamental principles of international law, which can be the only framework for a permanent solution to the conflict.

In accordance with the legal analysis as set out in this position paper, Al-Haq strongly warns the Palestinian people and their representatives of the imminent risks associated with agreements that would violate their rights, most importantly their sovereign rights over Palestinian territory and their right to self-determination.

In its written submission to the ICJ, Israel invoked the maxim that 'no one can derive an advantage from his own wrong.'⁷¹ Ironically, this very principle would be violated through an agreement concluded on cession of territory between Israel and the Palestinian representatives. Under such an agreement Israel would undeniably benefit from its violations of international law committed in the OPT – above all the appropriation of land for settlement construction and expansion, the exercise of colonialism, the apartheid practices in the OPT, and denial of the right to self-determination.

While Al-Haq welcomes the international community's interest and efforts to resolve the Israeli-Palestinian conflict and to terminate the prolonged Israeli occupation of the OPT, it is Al-Haq's conviction that international law should not just inform and facilitate the process of negotiating outstanding key issues, but must constitute the foundations upon which this process is based. In its 2004 Advisory Opinion on the Wall, the ICJ emphasised this by stating that a "negotiated solution to the outstanding problems and the establishment of a Palestinian State" should be "on the basis of international law."⁷²

“International law should not just inform and facilitate the process of negotiating outstanding key issues, but must constitute the foundations upon which this process is based.”

In this regard, Al-Haq is disappointed by the recent calls and support from the international community for agreements involving 'mutually agreed land swaps' and considers their conduct to conflict with High Contracting Parties' obligation to ensure respect for the Fourth Geneva Convention under all circumstances.⁷³ The call for 'land swaps' also conflicts with the aspirations enshrined in the Preamble of the UN Charter when it reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."⁷⁴

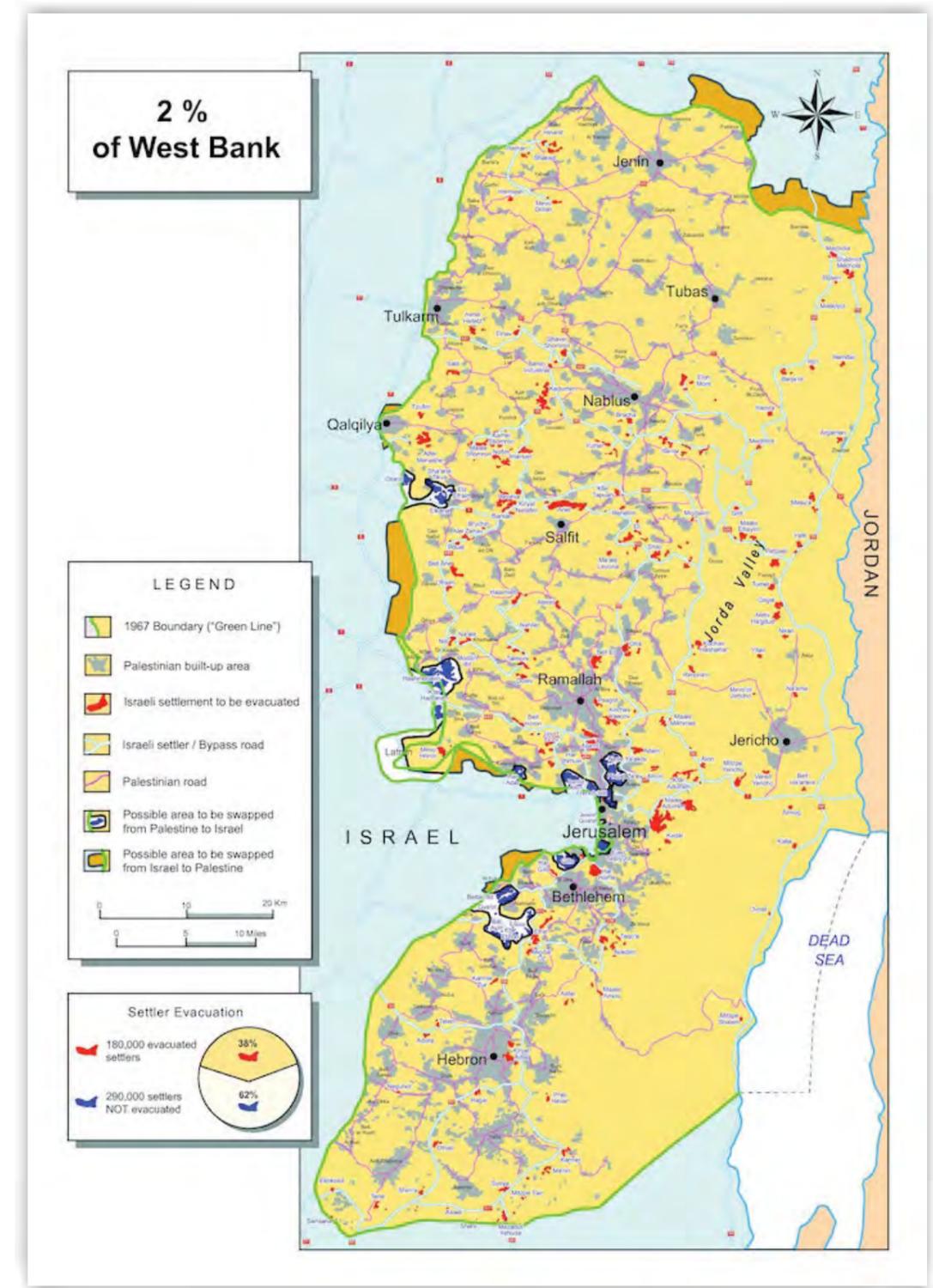
⁷¹ The principle of *nullus commodum capere potest de injuria sua propria*. See *Advisory Opinion on the Wall* (n 20) paragraph 63.

⁷² *Advisory Opinion on the Wall* (n 20) paragraphs 161-162.

⁷³ Four Geneva Conventions (1949) Common Article 1. As the ICRC Commentary notes, this Article was intended to emphasise the responsibility of the Contracting Parties to "[...] prepare in advance, that is to say in peacetime, the legal material or other means of ensuring faithful enforcement of the Convention[s] when the occasion arises," to prevent grave breaches from reoccurring. See JS Pictet (n 23) 15-17.

⁷⁴ UN, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI.

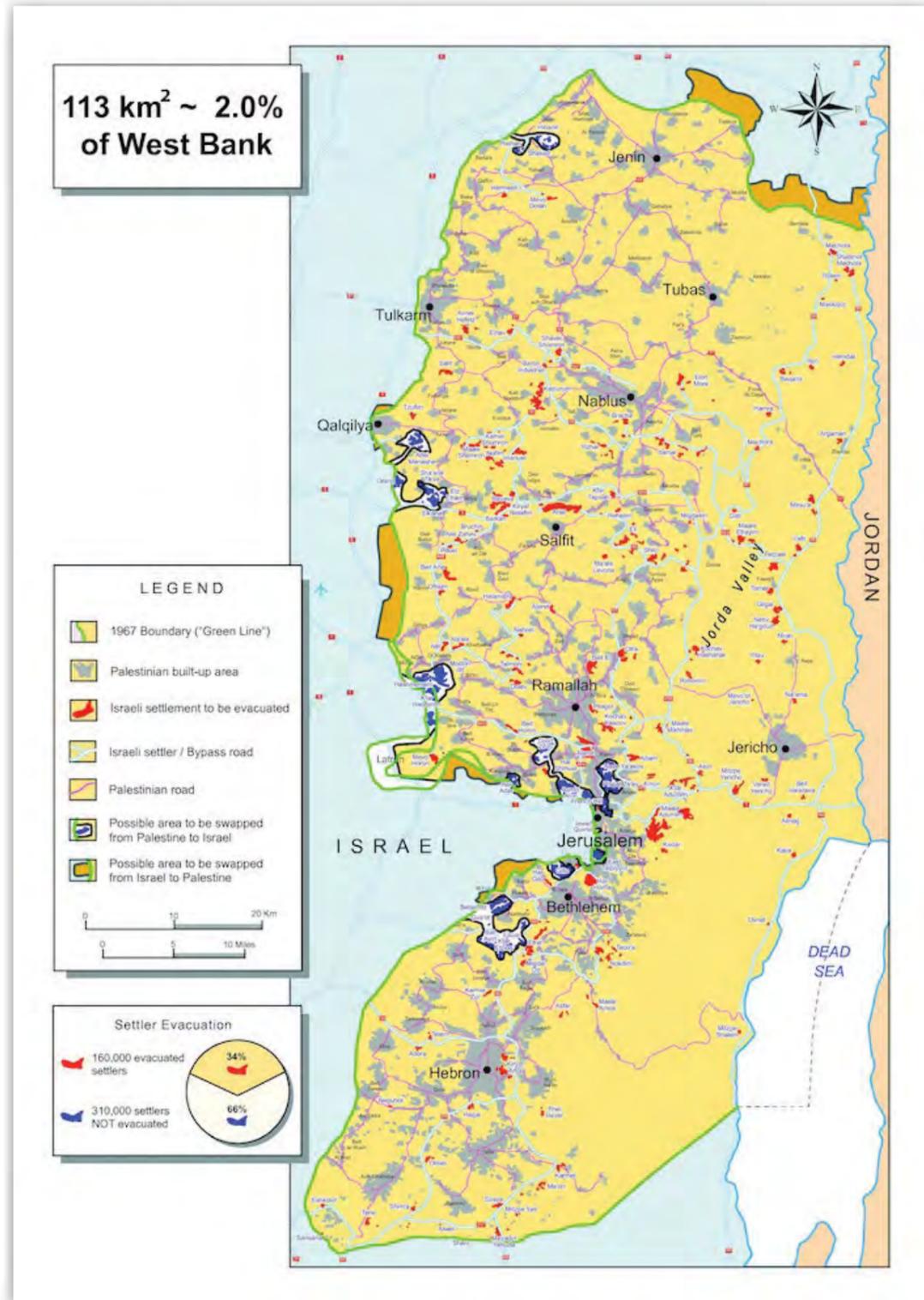
Map 1 – Palestine’s proposed swaps in the West Bank (A), 2008⁷⁵



75 This map is likely the closest map published of what the 1.9 per cent proposition entails. Al Jazeera Transparency Unit, 'The Palestine Papers Project' *Al Jazeera* (January 2011) <<http://www.ajtransparency.com/files/2456.pdf>> accessed 8 December 2011.

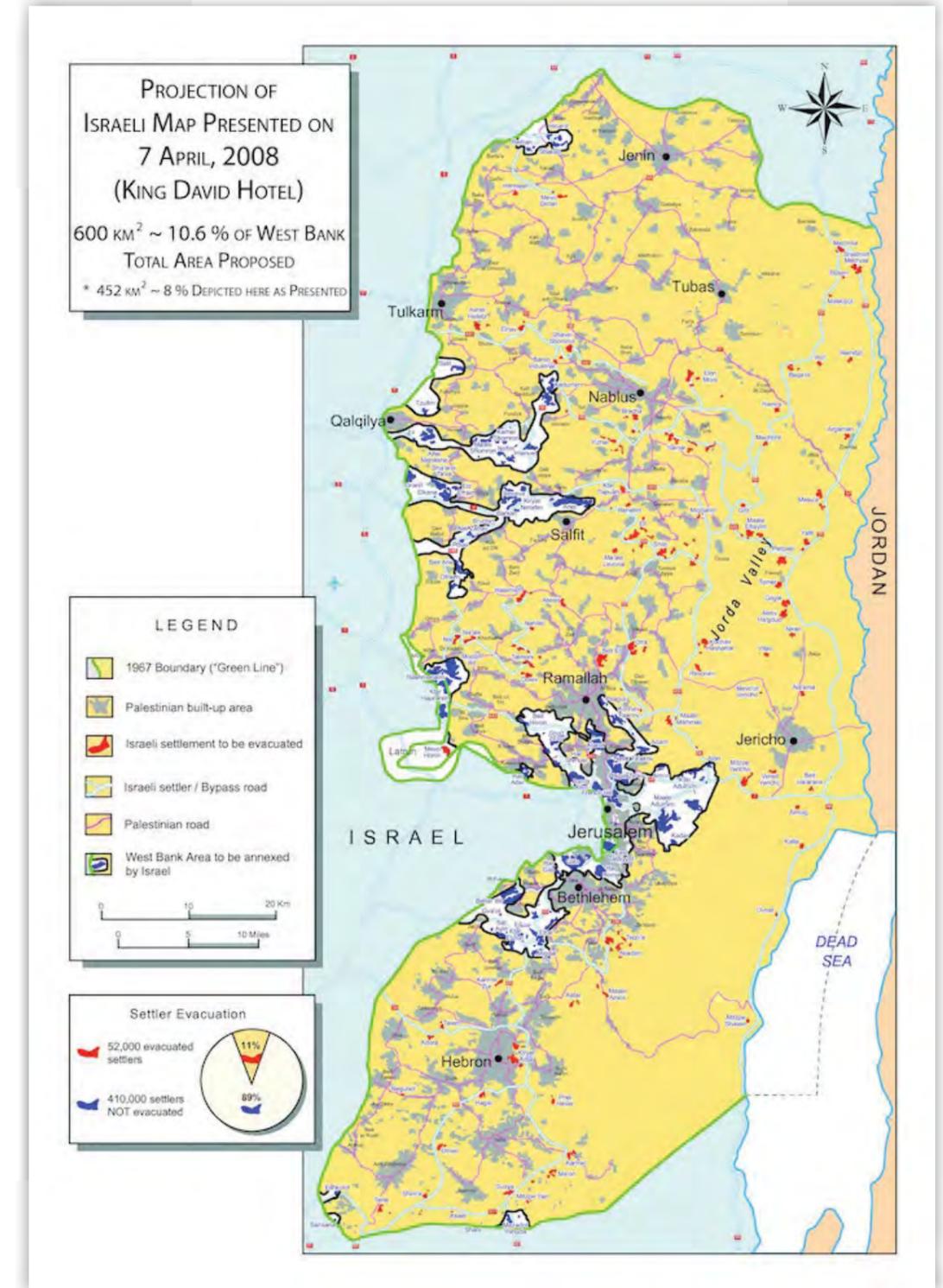
THE ANNEX:
MAPS

Map 2 – Palestine's proposed swaps in the West Bank (B), 2008⁷⁶



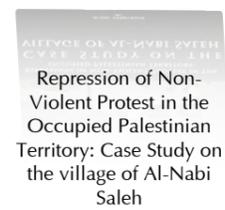
76 This map represents an alternative to Map 1, also drawn up in the process of reaching the 1.9 per cent proposition. Al Jazeera Transparency Unit, 'The Palestine Papers Project' *Al Jazeera* (January 2011) <<http://www.ajtransparency.com/files/2423.pdf>> accessed 8 December 2011.

Map 3a – Israel's proposed 10.6 per cent swaps in the West Bank, 2008⁷⁷



77 Israel proposed to exchange 10.6 per cent of West Bank territory, which includes East Jerusalem. According to Israel's calculations, it would annex 6.8 per cent of the West Bank including the four main settlement blocs of Gush 'Etzion (with Efrata), Ma'ale Adumim, Giv'at Ze'ev and Ariel), as well as all of the settlements in East Jerusalem (with Har Homa), in exchange for the equivalent of 5.5 per cent from Israeli territory. These percentages are based on Israeli calculations for the West Bank and therefore exclude East Jerusalem. Al Jazeera Transparency Unit, 'The Palestine Papers Project' *Al Jazeera* (January 2011) <<http://www.ajtransparency.com/files/2424.pdf>> accessed 8 December 2011.

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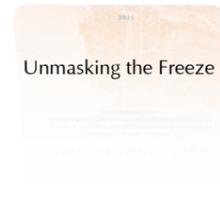
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AL - HAQ

ABOUT AL-HAQ

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

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

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), and the Palestinian NGO Network (PNGO).

